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IN THE

Supreme Court of the United States

TERRANCE S. WILSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sales volume allocation agreement is *per se* unlawful under Section 1 of the Sherman Act?

2. Whether, for purposes of determining the volume of commerce attributable to the defendant under Sentencing Guideline § 2R1.1(b)(2), the defendant should have the burden of proving that particular sales were not affected by the charged conspiracy?

3. Whether a court may enhance a criminal sentence for a managerial or supervisory role pursuant to Sentencing Guideline § 3B1.1(b), where all members of a conspiracy have an equal role in its management and operation?

4. Whether a federal court of appeals exceeds its deferential role under 18 U.S.C. § 3742(e) when it reverses the district court's plausible factual findings on a sentence enhancement issue, substitutes its own finding of fact, and instructs the district court to impose a particular sentence?

LIST OF PARTIES IN THE COURT OF APPEALS

Petitioner Terrance S. Wilson, a natural person, and Respondent the United States of America were parties in the United States Court of Appeals for the Seventh Circuit. Michael D. Andreas, a natural person, also was a party in the court of appeals. Mr. Andreas has filed a separate petition for certiorari, as permitted by Rule 12.4, that raises substantially similar issues. Mark E. Whitacre did not appeal his conviction and sentence, and has no interest in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terrance S. Wilson respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-62a) is reported at 216 F.3d 645. The court of appeals' unpublished order denying rehearing and rehearing en banc is reproduced at App. 149a-150a. The memorandum and order of the United States District Court for the Northern District of Illinois imposing sentence (App. 63a-92a) is unreported. The district court's memorandum and order ruling on the application of "volume of commerce" under U.S.S.G. § 2R1.1 (App. 93a-99a) is unreported. The district court's memorandum opinion and order denying Petitioner's post-trial motions (App. 100a-140a) is reported at 39 F. Supp. 2d 1048. The district court's memorandum and order denying Petitioner's motion for judgment of acquittal (App. 142a-148a) is reported at 23 F. Supp. 2d 863.

JURISDICTION

The court of appeals' judgment was entered on June 26, 2000. Wilson's timely petition for rehearing or rehearing en banc was denied July 27, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent portions of the Fifth Amendment to the Constitution of the United States, 15 U.S.C. § 1 (1994), 18 U.S.C. § 3742 (1994), and U.S.S.G. §§ 2R1.1 and 3B1.1 (November 1, 1998) are reproduced at App. 151a-155a.

STATEMENT OF THE CASE

Petitioner Terrance S. Wilson, a former executive of Archer Daniels Midland Corporation ("ADM"), was convicted after a jury trial of one count of conspiracy in restraint of trade, in violation of 15 U.S.C. § 1 (1994).[1] The court of appeals affirmed Wilson's conviction, but vacated and remanded with instructions to increase his sentence.

Wilson petitions for review of three serious errors in the proceedings below. First, the district court permitted a new antitrust theory—sales volume allocation—to be tried as a *per se* offense, notwithstanding that this theory has never been addressed in a civil or criminal context and has never been subject to Rule of Reason analysis. This novel but important issue of federal antitrust law warrants this Court's scrutiny.

Second, in affirming the sentence enhancement with respect to the volume of commerce affected, the court of appeals has decided an issue of broad federal applicability in a fashion that conflicts directly with the Sixth Circuit and is in some tension with the Second Circuit. This Court's review is necessary to resolve this conflict and fulfill the Sentencing Reform Act's goal of uniform federal sentencing.

Third, Wilson's sentence was enhanced *on appeal* on the ground that he was a manager of the conspiracy. Although the sentencing court made specific findings of fact to the contrary, the court of appeals, confused about applicable law under the sentencing guideline and heedless of its deferential role, made its own factual findings supporting a leadership enhancement. The appellate court's decision is in tension with decisions of other circuits applying this guideline, and conflicts with decisions of this Court defining appellate courts' limited role in reviewing factual findings. The Court should grant certiorari to interpret the deferential standard of review applicable under the Sentencing Reform Act, and to affirm the importance of deferential review to an efficiently functioning appellate process.

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[1] The district court had jurisdiction under 18 U.S.C. § 3231 (1994).

Trial Proceedings

Wilson was charged, under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), with conspiring with other global producers of agricultural products to fix prices and allocate sales volumes of lysine. Wilson was tried together with two other ADM executives, Michael ("Mick") Andreas and Mark Whitacre.[2] Wilson and Whitacre were both division chiefs within ADM. Each reported to Andreas, ADM's vice chairman and executive vice president of sales and marketing.

Lysine, a livestock feed additive, is a commodity product produced by only five producers worldwide: four Japanese and Korean agricultural producers (Ajinomoto Co., Kyowa Hakka Kogyo Co., Sewon America Inc., and Cheil), and ADM. ADM was the most recent entrant in the market, beginning its lysine operations in 1991.

The evidence at trial included testimony and documents from the Asian producers describing a world-wide price-fixing cartel for lysine—a cartel that existed among the Asian producers before ADM entered the lysine market,[3] and was led by Ajinomoto, the world leader in lysine production. (At least one Ajinomoto document described Ajinomoto as the "leader in price fixing."[4]) The government's witnesses testified that ADM became a member of the cartel shortly after entering the lysine market, and, along with Ajinomoto, quickly became a dominant force in the cartel due to those two companies' leading market share.

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[2] Andreas has filed his own petition, as permitted by Rule 12.4. Whitacre, a government informant, was tried together with Andreas and Wilson over Andreas' and Wilson's objections. Whitacre did not appeal his conviction or sentence and has no interest in this petition.

[3] *See, e.g.*, Tr. 4145; Wilson Ex. 103.

[4] *See* Wilson Ex. 74B, at Bates HLI 44382.

The evidence also included numerous audio and video tapes of conversations and meetings between ADM representatives and representatives of the other lysine producers. The tapes recorded a number of face-to-face meetings among the lysine producers at which Wilson appeared to agree with the other producers to join and participate in the cartel.

The sales volume allocation was a *volumetric* allocation: unlike geographic or customer-based market allocations (which are recognized *per se* offenses), the lysine producers' volume agreement allotted each producer a certain percentage share of each year's aggregate global lysine sales among all producers. The agreement placed no limit on the level of lysine production (either individual or aggregate), and worldwide volume of lysine sales increased dramatically over the course of the agreement.

Wilson never contested having discussions with ADM's competitors that appeared to suggest ADM's participation in the cartel. His defense, argued through counsel, was that he did so to deceive ADM's competitors, lull them into a false sense of security, and gain confidential market information while ADM in fact competed aggressively to break into the cartel-dominated lysine market and achieve a dominant market share. Wilson's intent was his entire defense.

The indictment alleged price fixing and volume allocation as separate goals of the conspiracy. The government tried the sales volume allocation as a *per se* offense, offering no expert testimony that volumetric allocations are anticompetitive under a Rule of Reason. The defendants moved for acquittal,[5] arguing that sales volume allocation had never before been adjudicated to be a *per se* offense, so that the absence of Rule of Reason analysis was fatal. The district court denied the motion, ruling that the *per se* standard applied to the sales volume allocation because the allocation was done in furtherance of price fixing. The district court stressed that the jury "should, and will, be permitted to draw its own conclusions as to whether the sales volume [*sic*] was in furtherance of the price-fixing scheme." App. 148a.

Subsequently, however, the court refused the defendants' proposed jury instruction to that effect. *See* Tr. 5463-64.[6] The court instructed the jury that it could convict the defendants of *either* an agreement to fix prices *or* an agreement to allocate sales volumes, and did not require the jury to find the sales volume allocation to be in furtherance of price fixing. *See* Tr. 5590-91.

In closing argument, the prosecutor stressed that Andreas, Wilson, and Whitacre were the only three individuals at ADM who knew about the price-fixing scheme:

> Only three people at ADM were given knowledge that they were engaging in price-fixing in lysine . . . . Mr. Andreas, Mr. Wilson, and Mr. Whitacre. No one else was to be trusted with that knowledge. Even the salesmen weren't to be told about this, and that's something that we saw many times.

Tr. 5620.

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[5] The defendants' motions regarding the *per se* nature of the offense were briefed and argued by Andreas' counsel, but were joined by Wilson. *See, e.g.*, App. 34a, 101a.

[6] The instruction was offered by Andreas, but joined by Wilson. *See* note 5, *supra*.

The jury returned a general verdict of guilty against all three defendants.

Sentencing

Two issues were disputed at sentencing. First, the parties disputed the measure of the volume of commerce affected by the offense for purpose of upward adjustment under U.S.S.G. § 2R1.1. The defense argued that because the conspiracy was ineffective in raising prices, the commerce in lysine was largely or completely unaffected. The district court accepted the government's rationale, adopted from *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995), that *all* lysine sales were affected during the conspiracy, regardless of any ultimate change in price. The court therefore counted all of ADM's domestic dry lysine sales during the conspiracy, some $168 million, which resulted in a seven-level increase in Wilson's sentence.

Second, the parties disputed the application of sentence enhancements for leadership role in the conspiracy, under U.S.S.G. § 3B1.1. The government argued the evidence had shown Wilson was a manager of the offense, because he had led and organized the other lysine producers in making the price-fixing scheme effective. Contrary to the prosecutor's statement in summation, the government further argued that three ADM sales executives, under Wilson's leadership, had participated in implementing the scheme. The district court rejected the government's arguments. First, the court ruled that the three sales executives could not be counted "participants" for the purpose of leadership under the guideline, since "the record clearly reveals that none of the ADM sales executives knew, let alone, [*sic*] participated in the conspiracy." *See* App. 81a.[7] The court further found, after evaluating all of the evidence including the tapes of the meetings, that Wilson's role "did not appear to be any greater than that of the other foreign lysine competitors," but rather that "he was a 'coequal' with his co-conspirators—no more or less culpable than the rest of his co-conspirators." App. 84a. Thus, the court denied the upward adjustment. *Id.* at 84a-85a.

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[7] The court noted the government's statement to that effect in closing argument. *See id.*

Wilson was sentenced to two years' confinement and a fine of $350,000. *See* App. 89a.

Proceedings on Appeal

The court of appeals affirmed Wilson's conviction, but remanded for resentencing. The court decided Wilson *was* a manager of the conspiracy, and instructed the district court to adjust his sentence upward.

On the *per se* offense issue, the court acknowledged that a volumetric market allocation had never been addressed in the case law. The court affirmed the district court, however, on the rationale adopted by the district court after trial: that the volume allocation was at bottom an output restriction designed to raise prices. *See* App. 36a-37a.

Between Wilson's sentencing and decision of his appeal, the Second Circuit weighed in on the volume of commerce question, rejecting the *Hayter* analysis adopted by the district court. *See United States v. SKW Metals & Alloys*, 195 F.3d 83 (2d Cir. 1999). In Wilson's appeal, the Seventh Circuit joined the Second Circuit in rejecting *Hayter* as an overbroad and unnatural reading of the guideline. The court nonetheless affirmed the volume of commerce adjustment because it believed the defendants could not show that the volume of commerce affected was less than $100 million, the threshold volume for which they were sentenced. *See id.* at 60a.

In reversing the district court and ordering enhancement for leadership, the appellate court rejected the district court's finding that Wilson had not supervised any other participants.

First, the court found, contrary to the district court, that Wilson had supervised three ADM sales executives who qualified as "participants" under the guideline. *See* App. 61a. Second, the court invoked the concept of "collective leadership" in rejecting the district court's characterization of all of the conspirators as "co-equals" in the offense. *See id.* Finally, the court rejected the district court's view of Wilson's role in the meetings, stating that Wilson "appears on countless tapes proposing ways to run the cartel and ways to make it more efficient. His entire purpose in attending lysine meetings . . . was to bring his management skills to the cartel." App. 62a. The court therefore directed the district court to apply the three-level enhancement. *See id.*

Following this instruction, the district court increased Wilson's sentence from twenty-four to thirty-three months.[8]

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Creation of a New *Per Se* Antitrust Offense Warrants This Court's Scrutiny.

By ratifying the district court's instructions regarding the sales volume allocation, the court of appeals has created a new *per se* antitrust offense without conducting a Rule of Reason analysis or requiring a finding of intent to restrain trade under this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). In so doing, the court of appeals decided an important issue of substantive antitrust law that deserves this Court's scrutiny. The court's disposition of the issue, permitting *per se* treatment of a theory never before adjudicated, conflicts with this Court's established antitrust precedents.

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[8] Wilson's $350,000 fine, the statutory maximum, was unchanged.

The sales volume allocation in this case differed in important ways from other agreements recognized as *per se* offenses. Importantly, it was *not* an output restriction. In the district court, the government emphasized that it was not charging an output restriction, and a government agent admitted the government had no evidence of any production limitation. Tr. 4010-11, 4053. The court acknowledged the government's framing of the issue, *see* App. 109a, and instructed the jury it could convict if it found simply that the defendants had agreed to allocate the producers' respective sales volumes. Tr. 5588, 5590-91. So instructed, the jury made no finding of output restriction. Nor could it have, since lysine production was not restricted and in fact rose for all producers during the agreement.[9]

The volume allocation also differed from other recognized *per se* offenses, such as geographic or customer allocations. The latter types of agreements restrain competition by restricting customers' choice among producers, effectively creating mini-monopolies with respect to each region or customer. By contrast, a market-wide allocation of share as a percentage of volume is not necessarily anticompetitive, and in certain circumstances may have procompetitive effects. In a market with high barriers to entry and precipitously expensive production difficulties (as with a bioengineered product such as lysine),[10] a sales volume allocation may keep lagging producers from leaving the industry, thus preventing concentration of supply.[11] Allocation of sales volume may also serve to encourage development of worldwide demand by eliminating freeriding opportunities among producers. (Increasing the overall size of the market tends to be procompetitive, since it may engender economies of scale, and/or encourage new producers to enter the market.)

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[9] *See* Gov. Ex. 10/25/93 - 1B56-58-T1, at 135-39; Wilson Ex. 061T, at 1.

[10] *See* Wilson Ex. 005, at 1-3 (describing ADM's capital outlays to enter the market).

[11] There was some discussion among the lysine producers about the possibility that production difficulties would drive some producers from

Whether the sales volume allocation was procompetitive or anticompetitive was not adjudicated in this case, due to the district court's charge to the jury of a *per se* theory. *See* Tr. 5584-85. The point presented for review is not whether the global allocation of sales volumes in lysine was or was not procompetitive, but rather that it should have been subjected to Rule of Reason analysis. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10, 22 (1997); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 49-51, 57-59 (1977); *White Motor Co. v. United States*, 372 U.S. 253, 259-64 (1963). The court of appeals' equation of sales volume allocation with simple output restriction (a recognized *per se* offense), *see* App. 36a, created a dramatic expansion of that *per se* theory of liability without the careful consideration or considerable experience with that business practice that the Rule of Reason demands. *See State Oil*, 522 U.S. at 10; *White Motor*, 372 U.S. at 259-64.

Such a broad expansion of federal antitrust law on an issue not previously addressed in an appellate court deserves this Court's scrutiny. This attention is particularly merited due to the stiff civil and criminal penalties that attach to a violation of the Sherman Act. By creating new *per se* antitrust violations, courts threaten to upset the legitimate expectations of the business world, retroactively imposing strict liability for conduct never before found unlawful. *See Gypsum*, 438 U.S. at 439-43. The lower courts' volume allocation rule has no

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the industry, unless they could continue to make a marginal profit. *See* Gov't Ex. 4/30/93 - 1B46-T1, at 37-38.

basis in existing law, and should not be allowed to gain a greater foothold.

II. The Court of Appeals' Ruling on Volume of Commerce Conflicts With Those of Its Sister Circuits

The court of appeals' decision also raises a substantial question with respect to the method by which the volume of affected commerce is to be measured for sentence enhancements under U.S.S.G. § 2R1.1. There is an acknowledged disagreement among the circuits on this issue.

At the time of Wilson's sentencing, the Sixth Circuit was the only court of appeal to have ruled on the question. *See United States v. Hayter Oil*, 51 F.3d 1265, 1272-74 (6th Cir. 1995). (That ruling was followed by the trial court in this case. *See* App. 93a, 96a-99a.) Following sentencing but before Wilson's appeal was decided, the Second Circuit rejected the Sixth Circuit's analysis as an unnatural and narrow reading of the guideline. *See United States v. SKW Metals & Alloys*, 195 F.3d 83, 90-92 (2d Cir. 1999). In Wilson's appeal, the Seventh Circuit joined the Second Circuit in rejecting the Sixth Circuit approach. *See* App. 57a. The Seventh Circuit parted ways with the Second Circuit majority, however, to follow a third path charted by a judge concurring specially in the Second Circuit result. *See id.* at 58a-59a. The method endorsed by the court of appeals burdens defendants with showing the volume of commerce *un*affected by the offense. *See id.* at 59a.

The Court's review is needed to resolve this split among the courts of appeals on this issue, and restore uniformity to sentencing under guideline § 2R1.1.

The development of the split among the circuits on this issue is discussed in more detail in the petition for review of the same judgment filed by Michael D. Andreas, whose argument on this issue Wilson adopts by reference.[12]

III. The Court of Appeals' Ruling on Leadership Roles Raises Questions About the Interpretation of the Sentencing Guidelines and the Scope of Appellate Review

A. The Legal Standards Applied by the Court of Appeals are in Tension With Decisions of Sister Circuits

This petition raises questions about a key provision of the Sentencing Guidelines never before considered by this Court. Guideline Section 3B1.1 permits a three-level increase in offense level where a defendant was a "manager or supervisor" of certain criminal activity. "To qualify for an adjustment under this section, the defendant must have been the . . . manager . . . or supervisor of one or more other participants." U.S.S.G. § 3B1.1, Application Note 2. A defendant is subject to this "management" enhancement only where the individuals that he supervises are themselves "criminally responsible for the offense," whether or not convicted. *Id.*, Application Note 1. "A person who is not criminally responsible for the commission of the offense . . . is not a participant" for purposes of the guideline. *Id.* This petition presents this Court with an opportunity to clarify the role of this guideline in a case involving a single-tiered antitrust conspiracy, where all members of the conspiracy share equal culpability.

The court of appeals rejected the district court's determination that a manager/supervisor enhancement was not warranted for Wilson. The district court had held that "the record does not establish any convincing evidence that Wilson supervised or managed any of his lysine co-conspirators." App. 84a. The court of appeals reversed, concluding that the district court was required to enhance Wilson's sentence because, in its view, he acted as a manager of the conspiracy. In reaching that conclusion, the court of appeals applied legal standards that are both inconsistent with the Sentencing Guidelines and in tension with the decisions of other federal appellate courts.

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[12] *See* Petition for Writ of Certiorari, *Michael D. Andreas v. United States of America*, No. 00-___, at 19-22 (filed Oct. 24, 2000).

The court of appeals' determination that Wilson was a "manager" relied, in part, on its conclusion that "at least three [ADM] sales executives—Marty Allison, Alfred Jansen and John Ashley—. . . helped to implement the pricing and volume allocation schemes." App. 61a. While the reasoning underlying this conclusion is not a model of clarity, it serves, in part, as the basis upon which the court of appeals concluded that Wilson and Andreas supervised the activities of other criminal participants. Tellingly, however, the court of appeals did *not* find that these three sales executives were, in fact, *knowing* "participants" in the criminal scheme. Such a conclusion would be flatly inconsistent with the district court's fact findings: that reliance on the participation of the three sales executives "does not work since . . . the record clearly reveals that none of the ADM sales executives knew, let alone, participated in the conspiracy." App. 81a. The court of appeals did not identify an aspect of this statement that was incorrect, did not identify any contrary evidence, and did not state that these individuals actually had knowledge of the conspiracy.

In this context, the court of appeals' reliance on the role of the other ADM sales executives runs counter to the clear directive of the Sentencing Guidelines. The sales executives cannot be considered "participants" subject to management by Wilson because the record does not support the attribution of criminal responsibility to them. *See* U.S.S.G. § 3B1.1, Application Note 1; *accord* App. 81a. Numerous other federal appellate courts have reached just that conclusion, holding that a defendant cannot be held to be a "manager or supervisor" unless the other persons that he manages or supervises are, themselves, criminally culpable—management of mere "unknowing" or "unwitting" underlings is insufficient to support the application of § 3B1.1. *See United States v. Bey*, 188 F.3d 1, 10 (1st Cir. 1999) ("to the extent that [defendant] supervised mere 'dupes,' unaware of the criminal activity," defendant does not qualify as supervisor); *see also United States v. Lewis*, 68 F.3d 987, 989-90 (6th Cir. 1995) (no enhancement for defendant who recruited unwitting persons to engage in fraud); *United States v. Melendez*, 41 F.3d 797, 800 (2d Cir. 1994) (no enhancement for a defendant who supervised innocent parties); *United States v. Roberts*, 14 F.3d 502, 524 (10th Cir. 1993) (no enhancement where "no evidence of [defendant's] control of anyone"). By failing to follow the clear holding of its sister circuits, the court of appeals here has created inexorable confusion for future courts applying § 3B1.1 to similar criminal conspiracies.[13]

The court of appeals compounded its error by ruling that both defendants' sentences should be enhanced under the "concept of collective leadership." App. 61a. Under the court of appeals' "collective leadership" theory, these defendants could be viewed as co-leaders of the conspiracy with the foreign co-conspirators, and their joint participation with these equal co-conspirators was sufficient, in the court of appeals' view, to find that Andreas and Wilson were respectively a "leader" and a "manager" under § 3B1.B. *See* App. 61a.

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[13] To the extent the court of appeals' opinion could be read to conclude, without expressly stating, that the sales executives were *knowing* participants in the conspiracy, its determination is flatly inconsistent with the record and with the admissions of the government below. That interpretation of the appellate court's opinion would raise a separate question (concerning the proper scope of appellate review) that is worthy of this Court's review. *See* discussion at 18-20, *infra*.

The principal problem with the "collective leadership" theory is that it rests on an assumption that every member of this conspiracy was a "leader" of the conspiracy. But that assumption is at odds with the express purpose of § 3B1.1. "This adjustment is included primarily because of concerns about *relative responsibility*." U.S.S.G. § 3B1.1, Commentary, Background; *accord* App. 80a-81a. Therefore, a "defendant who had no greater role than any other participant cannot receive a § 3B1.1 increase." *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994). As the Tenth Circuit has held in rejecting a theory similar to that adopted here, "We do not believe that the guidelines intend to define organizer or leader so broadly that nearly every member of a conspiracy qualifies." *United States v. Litchfield*, 959 F.2d 1514, 1523 (10th Cir. 1992). But that is precisely what the court of appeals has done in this case.

The Seventh Circuit's notion of "collective leadership" originated in an entirely different context. In *United States v. Evans*, the court held that members of a drug gang's "board of directors" could be subjected to a leadership enhancement under Section 3B1.1 because, collectively, they exercised influence over other criminal participants. *See United States v. Evans*, 92 F.3d 540, 545 (7th Cir. 1996). But there, numerous *criminally responsible* underlings followed the orders of the "board." *See id.* Viewed through the *Evans* lens, the only participants in the conspiracy found by the jury in this case were the members of the "board of directors" itself. Whatever the merits of the "collective leadership" theory in a case like *Evans*, it can have no application where, as here, it would encompass every culpable participant in a criminal conspiracy. As used by the court of appeals, the "collective leadership" theory frustrates the express purpose of §3B1.1 and runs counter to the Tenth Circuit's reasoning in *Litchfield.*

The issue of when a leadership enhancement is appropriate under § 3B1.1 is an important one that has not previously been reached by this Court. It has potential applicability in each and every criminal conspiracy case. But in a single-tiered conspiracy, such as this one, the court of appeals' notion of "collective leadership" would mean that § 3B1.1 could be applied to *all conspiracy participants*, counter to the spirit and letter of the Sentencing Guidelines. This Court should grant certiorari to clarify the proper role of the leadership enhancement in criminal conspiracy cases.

B. The Court of Appeals' Usurpation of the Sentencing Court's Fact-Finding Role Conflicts With the Statutory Standard of Review

Finally, this case presents the need for this Court to interpret a key statute, never before addressed by this Court, defining the standard of deference that appellate courts must apply in reviewing sentences under the Sentencing Reform Act. The statute, 18 U.S.C. § 3742(e), requires courts of appeals to defer not only to trial courts' findings of fact, but also to their application of the guidelines to those facts. Here, the court of appeals egregiously usurped the trial court's role by substituting its own factual findings for those of the district court. The court of appeals' ruling violated the statutory standard of review as well as this Court's established precedents regarding appellate courts' limited role under the "clear error" standard.

Deferential appellate review of trial court factfinding is not a new principle. The "clearly erroneous" standard has applied to appellate factual review in civil cases at least since the adoption of the Federal Rules of Civil Procedure. *See*

Fed. R. Civ. P. 52(a), Advisory Committee Notes, 1937 Adoption. Nonetheless, the standard has needed periodic clarification to address its application in various contexts.[14] Similarly, this Court has found it necessary to grant review periodically to expound on the standard in practice, and define for appellate courts their limited institutional role. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 220-21 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 566 (1985); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 108 (1969).

What is new here is the application of the deferential standard in the context of federal sentencing.[15] The Sentencing Reform Act set a statutory standard of review for sentences that not only includes clear error review for factual findings, but also requires "due deference" to the sentencing court's application of the guidelines to the facts:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e) (1994).

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[14] For instance, Rule 52(a) was modified as recently as 1985 to address whether such deference was owed to trial court factual findings that were based solely on documentary evidence, or did not rely on evaluation of credibility or demeanor evidence. *See id.*, 1985 Amendment.

[15] Appellate review of sentencing is a relatively recent phenomenon. "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal." *Koon v. United States*, 518 U.S. 81, 96 (1996) (citation omitted).

This Court has never interpreted the § 3742(e) standard for review of factual determinations in guidelines sentences.[16] Review is necessary in this case to clarify for courts of appeals the "due deference" they must give to district courts' "application of the guidelines to the facts," as well as to reinforce the applicability in the sentencing context of the same "clear error" standards applied under Civil Rule 52(a).

Here, the court of appeals usurped the district court's role, giving no deference to the sentencing court's application of the guideline to the facts, as required under § 3742(e). Although the court recited the clear error standard in its opinion, *see* App. 60a, the court improperly rejected findings of the district court that were supported by the evidence, and substituted its own view of the evidence that it re-weighed first-hand.

First, the court of appeals disregarded the district court's factual finding that the three ADM sales executives—Allison, Jansen, and Ashley—were not knowing participants in the scheme.[17] The district court had found, based on the record, that those three executives had not known of the scheme, and hence did not have the criminal culpability required to be "participants" under the guideline. *See* App. 81a. Confronting this question, the court of appeals reviewed the evidence for itself, focusing on "[e]vidence submitted at trial and during the sentencing phase indicat[ing] that [Allison, Jansen and Ashley] . . . helped to implement the pricing and volume allocation schemes." App. 61a. The court did not delineate the evidence on which it relied, made no mention of the evidence cited by the district court to the contrary, and did not explain why (or even if) that evidence was rejected.

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[16] In *Braxton v. United States*, 500 U.S. 344 (1991), this Court cited the "clearly erroneous" standard of § 3742(e), but did not apply or interpret it—holding instead that it was inapplicable to review of the meaning of a stipulation. *See id.* at 350.

The Court's only previous cases addressing appellate review of guidelines sentences have been *Koon v. United States*, 518 U.S. 18 (1996), and *Williams v. United States*, 503 U.S. 193 (1992). In *Koon*, the Court established and clarified the "abuse of discretion" standard that applies to judges' decisions to depart from the guidelines. *See Koon*, 518 U.S. at 85, 91, 96. In *Williams*, the Court addressed the requirements for disposition of sentencing appeals under § 3742(f)(1)-(3), *see Williams*, 503 U.S. at 198-99, 201-04, as well as the standards for determining the reasonableness of a departure under § 3742(f)(2), *see id.* at 203-05.

[17] The Seventh Circuit's opinion is ambiguous on this point. To the extent it found that the three other ADM employees qualified as "participants" because they helped implement the scheme even without

Next, the court of appeals rested its decision regarding Wilson's culpability on its own firsthand review of the audio and video tapes. Having reviewed the tapes itself, *see* Oral Arg. Tr. 54, the court relied on its own evaluation of the tapes, stating Wilson "appears on countless tapes proposing ways to run the cartel and ways to make it more efficient." App. 62a. The court further credited the government's argument that the entire purpose of Wilson's attending the meetings "was to bring his management skills to the cartel." *Id.* Again, the court made no mention of, much less deferred to, the district court's findings on the question.

Both these approaches to the evidence violate the deference due the district court under § 3742(e). The question for the court of appeals is not whether, having viewed the evidence, it would decide the question differently from the district court. *See, e.g., Anderson*, 470 U.S. at 573-74. Rather, in giving due deference, the appellate court is to start with the district court's finding, and ask whether it has support in the evidence. *See Amadeo*, 486 U.S. at 227, 228. If the district court has chosen between two plausible views of the

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culpable knowledge, it is a legally erroneous application of the guideline, as discussed at 13-14, *supra*.

evidence, its decision cannot be overturned. *See id.* at 226; *Anderson*, 470 U.S. at 574, 577.

Here, the district court explicitly and correctly described two plausible views of the evidence. One was the government's theory that Andreas and Wilson led the conspiracy on behalf of ADM. The other was that all of the lysine conspirators "had authority over their own underlings and exerted their own autonomy." App. 83a. Judge Manning chose the latter, observing that "the whole team wanted to play coach and quarterback which inevitably led to cheating amongst the conspirators." *Id.* The conspiracy only came to fruition when "the group collectively realized that the conspiracy would fail without mutual cooperation that could not exist unless all of the 'kingpins' (yes, plural) agreed." App. 83a-84a.

Judge Manning's choice between plausible views was fully supported in the evidence. There was ample evidence of the producers distrusting one another, cheating on the agreement, and of the Asian competitors conspiring behind ADM's back to fight ADM's emerging market dominance. *See, e.g.*, Wilson Ex. 74B, especially at Bates 44370-91. The evidence also showed the Asian producers were fixing prices long before ADM's market entry, *see, e.g.*, Tr. 4145, that Ajinomoto considered itself the worldwide "leader in price fixing," Wilson Ex. 74B, at Bates HLI 44382, and that one of the Asian executives was the "father of price fixing" in the lysine market. Tr. 5908; *see also* Tr. 4260. The judge correctly interpreted her mission to focus on *relative culpability* under the guideline, *see* App. 80a-81a, and determined as a factual matter that Andreas and Wilson were *equally* culpable with their fellow "kingpins." The judge thus declined to apply the leadership enhancement. App. 82a-84a.[18]

This case thus presents an ideal vehicle for explicating the § 3742(e) standard governing review of guidelines sentences. It features the overruling of district court factual findings: (i) without any examination of the evidence on which the district court relied, (ii) without specific citation of contrary evidence, and (iii) without regard to the government's own admissions at trial.

The standard prescribed in § 3742(e) is critical to the maintenance of an orderly system of review. Finality and judicial economy are served by deferring to trial courts' expertise in resolving issues of fact. Permitting active appellate factfinding will only encourage litigants to relitigate already resolved factual issues in their criminal appeals.[19] *See Anderson*, 470 U.S. at 575 (noting that forcing parties to persuade the trial judge on the facts is enough; "requiring them to persuade three more judges at the appellate level is requiring too much"); *accord* Fed. R. Civ. P. 52(a), Advisory

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[18] The trial court's finding that the three sales executives did not have knowledge of the scheme was similarly well supported in the record. The government's argument to that effect in closing, Tr. 5620, was by itself sufficient foundation for the district court's finding. The district court further noted trial testimony supporting its finding, *see* App.81a, evidence that was not addressed by the appellate court.

[19] Indeed, litigants may be *compelled* to re-argue their facts on appeal. In this case, for instance, the government appealed Wilson's sentence but cited no record evidence to sustain its burden of demonstrating clear error by the district court. Brief of Appellee United States, at 72-73. Notwithstanding the lack of showing by the party with the burden, the appellate court reviewed the evidence on its own and overturned the district court's finding. If such activism by appellate courts is permitted, both prosecutors and defendants will be forced to brief thoroughly even the factual issues decided in their favor, to protect any favorable rulings they received in the trial court.

Committee Notes, 1985 Amendment. In the sentencing context, the implications for judicial economy are substantial, given the 55,000 guidelines sentences imposed each year.[20] In particular, in 1999, over 2,000 defendants received enhancements for their aggravating roles in the offense under Guideline § 3B1.1 alone.[21]

Finally, review is also appropriate to emphasize that the deferential standard of § 3742(e) is to be applied evenhandedly, whether the district court's factual findings favor the defense or the prosecution. Cases are legion in the courts of appeals where appellate courts have cited the deferential standard in affirming enhancements of defendants' sentences. By accepting this case for review, the Court can make the point that the deferential standard of review for sentencing decisions is neutral in purpose—designed not to limit defendants' opportunities for reversal, but to protect the function of the district court and the appellate process. Proper application of the "due deference" standard in this case will emphasize the trial and appellate courts' respective institutional roles, and promote evenhanded application of the Guidelines.

In the nearly thirteen years since the Sentencing Guidelines took effect, the Court has not had occasion to interpret the "due deference to the district court's application of the guidelines to the facts" required under § 3742(e). This case presents the opportunity and the necessity for such review by this Court.

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[20] *See* United States Sentencing Commission, 1999 Sourcebook of Federal Sentencing Statistics, at Table 1. Even if only six percent of guidelines sentences are appealed, *see Koon*, 518 U.S. at 98 (citing 1994 statistic), application of the proper standard under § 3742(e) will still affect over 3,300 appeals each year.

[21] *See* 1999 Sourcebook, *supra* note 19, at Table 18.

CONCLUSION

For the foregoing reasons, this Court should grant the petition writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-3097, 99-3078, 99-3098, 99-3106,
99-3107, 99-3279 & 99-3363

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,

v.

MICHAEL D. ANDREAS and TERRANCE S. WILSON,
Defendants-Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 CR 762 – Blanche M. Manning, *Judge.*

ARGUED FEBRUARY 7, 2000
DECIDED JUNE 26, 2000

Before KANNE, ROVNER and EVANS, *Circuit Judges.*

KANNE, *Circuit Judge.* For many years, Archer Daniels Midland Co.'s philosophy of customer relations could be summed up by a quote from former ADM President James Randall: "Our competitors are our friends. Our customers are the enemy." This motto animated the company's business dealings and ultimately led to blatant violations of U.S. antitrust law, a guilty plea and a staggering criminal fine against the company. It also led to the criminal charges against three top ADM executives that are the subject of this appeal. The facts involved in this case reflect an inexplicable lack of business ethics and an atmosphere of general lawlessness that infected the very heart of one of America's leading corporate citizens. Top executives at ADM and its Asian co-conspirators throughout the early 1990s spied on each other, fabricated aliases and front organizations to hide their activities, hired prostitutes to gather information from competitors, lied, cheated, embezzled, extorted and obstructed justice.

After a two-month trial, a jury convicted three ADM officials of conspiring to violate § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which prohibits any conspiracy or combination to restrain trade. District Judge Blanche M. Manning sentenced defendants Michael D. Andreas and Terrance S. Wilson to twenty-four months in prison. They now appeal several issues related to their convictions and sentences, and the government counter-appeals one issue related to sentencing. We find no error related to the convictions, but agree with the government that the defendants should have received longer sentences for their leadership roles in the conspiracy.

I. HISTORY

The defendants in this case, Andreas and Wilson, were executives at Archer Daniels Midland Co., the Decatur, Illinois-based agriculture processing company. Mark E. Whitacre, the third ADM executive named in the indictment, did not join this appeal.[1] ADM, the self-professed

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[1] At his insistence, Whitacre was tried in absentia from the prison where he is serving a 108-month sentence for embezzlement. He was

"supermarket to the world," is a behemoth in its industry with global sales of $14 billion in 1999 and 23,000 employees. Its concerns include nearly every farm commodity, such as corn, soybeans and wheat, but also the processing of commodities into such products as fuel ethanol, high-fructose sweeteners, feed additives and various types of seed oils. ADM has a worldwide sales force and a global transportation network involving thousands of rail lines, barges and trucks. The company is publicly held and listed on the New York Stock Exchange.

The Andreas family has long controlled ADM. Dwayne Andreas is a director and the former CEO, G. Allen Andreas is the board chairman and president, and various other family members occupy other executive positions. Michael D. Andreas, commonly called "Mick," was vice chairman of the board of directors and executive vice president of sales and marketing. Wilson was president of the corn processing division and reported directly to Michael Andreas.

A. The Lysine Industry

Lysine is an amino acid used to stimulate an animal's growth. It is produced by a fermentation process in which nutrients, primarily sugar, are fed to microorganisms, which multiply and metabolize. As a product of that process, the microorganisms excrete lysine, which is then harvested and sold to feed manufacturers who add it to animal feed. Feed manufacturers sell the feed to farmers who use it to raise chickens and pigs. The fermentation process tends to be very delicate, and utmost care must be used to keep the fermentation plant sterile.

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represented vigorously by counsel at trial and aided his defense through telephone communication with his lawyer. Kazutoshi Yamada, an employee of Ajinomoto Co. of Japan, was the fourth defendant named in the indictment. He has not been tried and remains a fugitive.

Until 1991, the lysine market had been dominated by a cartel of three companies in Korea and Japan, with American and European subsidiaries. Ajinomoto Co., Inc. of Japan, was the industry leader, accounting for up to half of all world lysine sales. Ajinomoto had 50 percent interests in two subsidiaries, Eurolysine, based in Paris, and Heartland Lysine, based in Chicago. The other two producers of lysine were Miwon Co., Ltd. (later renamed Sewon Co., Ltd.) of South Korea, and Kyowa Hakko, Ltd. of Japan. Miwon ran a New Jersey-based subsidiary called Sewon America, and Kyowa owned the American subsidiary Biokyowa, Inc., which is based in Missouri.

Lysine is a highly fungible commodity and sold almost entirely on the basis of price. Pricing depended largely on two variables: the price of organic substitutes, such as soy or fish meal, and the price charged by other lysine producers. Together, the three parent companies produced all of the world's lysine until the 1990s, presenting an obvious opportunity for collusive behavior. Indeed the Asian cartel periodically agreed to fix prices, which at times reached as high as $3.00 per pound.

In 1989, ADM announced that it was building what would be the world's largest lysine plant. If goals were met, the Illinois facility could produce two or three times as much lysine as any other plant and could ultimately account for up to half of all the lysine produced globally. Even before the plant became operational, ADM embarked on an ambitious marketing campaign aimed at attracting large American meat companies, such as Tyson Foods, in part by capitalizing on anti-Asia sentiment prevalent at the time. Also around 1990, another South Korean company, Cheil Jedang Co., began producing lysine. Despite some early difficulties with the fermenting process, the ADM plant began producing lysine in 1991 and immediately became a market heavyweight, possibly even the industry leader. The two new producers created chaos in the market, igniting a price war that drove the price of lysine down, eventually to about 70-cents per pound. The Asian companies understandably were greatly concerned by developments in this once profitable field.

B. Start of the Conspiracy

Against this background, Kyowa Hakko arranged a meeting with Ajinomoto and ADM in June 1992. Mexico City was chosen as the site in part because the participants did not want to meet within the jurisdiction of American antitrust laws. Ajinomoto was represented by Kanji Mimoto and Hirokazu Ikeda from the Tokyo headquarters, and Alain Crouy from its Eurolysine subsidiary. Masaru Yamamoto represented Kyowa Hakko, and Wilson and Whitacre attended for ADM. Mimoto, Ikeda, Crouy and Yamamoto testified as government witnesses at trial. At this meeting, the three companies first discussed price agreements and allocating sales volumes among the market participants. Wilson, who was senior to Whitacre in the corporate hierarchy, led the discussion on behalf of ADM. The price agreements came easily, and all present agreed to raise the price in two stages by the end of 1992. According to internal Ajinomoto documents prepared after the meeting, the cartel's goal was to raise the price to $1.05 per pound in North America and Europe by October 1992 and up to $1.20 per pound by December, with other price hikes for other regions. The companies agreed to that price schedule and presumed that Ajinomoto and Kyowa would convince Sewon and Cheil to agree as well.

The sales volume allocation, in which the cartel (now including ADM) would decide how much each company would sell, was a matter of strong disagreement. In ADM's view, ADM should have one-third of the market, Ajinomoto and its subsidiaries should have one-third and Kyowa and the Koreans should have the remaining third. Ajinomoto—the historical industry leader—disagreed vehemently and thought

ADM did not deserve an equal portion of the market and could not produce that much lysine in any case. Wilson also suggested each company pick an auditor to whom sales volumes could be reported so that the cartel could keep track of each other's business. The meeting ended without a sales volume allocation agreement, but two months later, at the recommendation of Whitacre, the cartel raised prices anyway, and prices rose from $.70 to $1.05 per pound.

Still, the cartel considered a price agreement without allocating sales volume to be an imperfect scheme because each company would have an incentive to cheat on the price to get more sales, so long as its competitors continued to sell at the agreed price. With cheating, the price ultimately would drop, and the agreement would falter. An effort had to be made to get the parties to agree to a volume agreement, and to that end, Whitacre invited Ajinomoto officials to visit ADM's Decatur lysine facility to prove that it could produce the volume ADM claimed. Mimoto, Ikeda and other Ajinomoto officials, including an engineer named Fujiwara, visited the plant in September 1992. At a meeting before the tour, Whitacre and Mimoto confirmed the price schedule to which the parties had agreed in Mexico City.

The cartel met again in October 1992, this time in Paris. All five major lysine producers attended, along with representatives of their subsidiaries. Wilson and Whitacre again represented ADM. To disguise the purpose of the meeting, the parties created a fake agenda, and later a fictitious lysine producers trade association, so they could meet and share information without raising the suspicions of customers or law enforcement agencies. According to the agenda, the group was to discuss such topics as animal rights and the environment. In reality, they discussed something much dearer to their hearts—the price of lysine. According to internal Ajinomoto documents, the "purpose of the meeting" was to "confirm present price level and reaction of the market, and 2, future price schedule."

Shortly after this meeting, under circumstances explained below, Whitacre began cooperating with the FBI in an undercover sting operation aimed at busting the price-fixing conspiracy. As a result, most of the meetings and telephone conversations involving Whitacre and other conspirators after October 1992 were audiotaped or videotaped.

Despite the cartel's efforts to raise prices, the price of lysine dropped in 1993. According to executives of the companies who testified at trial, without a sales volume agreement, each company had an incentive to underbid the agreed price, and consequently each company had to match the lower bids or lose sales to its underbidding competitors. This resulted in the price of lysine falling in the spring of 1993. The group, calling itself "G-5" or "the club," met in Vancouver, Canada, in June 1993 to deal with the disintegrating price agreement. Wilson and Whitacre again represented ADM. At this meeting, the Asian companies presented a sales volume allocation that limited each company to a certain tonnage of lysine per year. ADM, through Wilson, rejected the suggested tonnage assignment because it granted ADM less than one-third of the market. Ajinomoto still considered ADM's demands too high.

That summer's strong commodities market permitted frequent increases in the lysine price, to which each of the companies agreed, despite the absence of a volume allocation. The cartel's continued strong interest in a volume allocation to support the price agreement led to another meeting in Paris in October 1993. The failure to reach a volume schedule in Paris finally led to a call for a meeting between the top management at Ajinomoto and ADM: Kazutoshi Yamada and Mick Andreas.

In October 1993, Andreas and Whitacre met with Yamada and Ikeda in Irvine, California. With Whitacre's assistance, the meeting was secretly videotaped and audiotaped. Andreas threatened Yamada that ADM would flood the market unless a sales volume allocation agreement was reached that would allow ADM to sell more than it had the previous year. The four discussed the dangers of competing in a free market and hammered out a deal on volume allocations, with Andreas accepting less than a one-third share of the market in exchange for a large portion of the market's growth. Specific prices were not discussed, but Andreas acknowledged the price deal that had already been negotiated. Yamada agreed to present ADM's proposal to the other three Asian producers.

A central concern to Andreas was the difficulty he expected the Asian producers to encounter in maintaining their agreed price level. As Andreas explained at some length, the Asian companies had a more decentralized sales system that depended on agents making deals with customers. ADM featured a very centralized system in which agents played a small role in overall sales and had no discretion over price. In such an environment, maintaining control over price was easy; for the Japanese, Andreas feared it would be difficult and suggested that Ajinomoto move to a more ADM-like centralized pricing system. Andreas also expressed concern that customers could "cheat" the producers by bargaining down the price, apparently by claiming to have received lower bids from competing producers. Ikeda and Yamada agreed that customer cheating was a problem, and the four briefly discussed a quick-response system that would allow the producers to verify with each other the prices offered to particular customers.

After the Irvine meeting, the cartel met in Tokyo to work out the details of the Andreas-Yamada arrangement. All the companies except for Cheil now agreed to both tonnage maximums and percentage market shares. The group excluded Cheil from this discussion because it considered Cheil's volume demand unreasonable. The cartel, expecting the lysine market to grow in 1994, thought it wise to agree on percentages of the market that each company could have since it was possible that all five producers could sell more than their allotted tonnage. With a total expected market of 245,000 tons for 1994, Ajinomoto was to sell 84,000 tons, ADM would sell 67,000 tons, Kyowa would sell 46,000 tons, Miwon would sell 34,000 tons and Cheil, if it eventually accepted the deal, would get 14,000 tons, according to the deal hammered out by Yamada and Andreas in Irvine.

As they had before the Andreas-Yamada meeting, Wilson and Whitacre attended these Tokyo meetings for ADM. In Tokyo, Wilson suggested, and the members agreed, that each producer report their monthly sales figures by telephone to Mimoto throughout the year, and if one producer exceeded its allocation, it would compensate the others by buying enough from the shorted members to even out the allocation. The producers also agreed on a new price of $1.20 for the United States market. The agreement to buy each other's unsold allocation cemented the deal by eliminating any incentive for a company to underbid the sales price. According to Mimoto: "[S]ince there is an agreement on the quantity allocation, our sales quantity is guaranteed by other manufacturers of the lysine. So by matching the price, to us, lowering the price is very silly. We can just keep the price." With the agreement on prices and quantities in place, the lysine price remained at the agreed level for January and February 1994.

On March 10, 1994, the cartel met in Hawaii. At this meeting, attended by Wilson and Whitacre on behalf of ADM, the producers discussed the progress of the volume allocation agreement, reported their sales figures and agreed on prices. They also considered letting Cheil into the allocation agreement and agreed to grant the company a market share of 17,000 tons. Cheil accepted this arrangement at a meeting later that day, at which Wilson explained that the conspiracy would operate almost identically to the scheme used to fix prices in the citric-acid market. The cartel further agreed on prices for Europe, South America, Asia and the rest of the world, and discussed how the global allocations would work on a regional basis. According to the figures reported to Mimoto through May 1994, prices were maintained, and both ADM and Ajinomoto were on track to meet their sales volume limits.

In the summer of 1994, the producers met in Sapporo, Japan, for a routine cartel meeting. Whitacre represented ADM by himself. At this meeting, Sewon demanded a larger share of the market for 1995. This created a problem for the cartel, which necessitated another meeting between Andreas and Yamada. In October 1994, while on a separate business trip to the United States, Yamada met with Andreas in a private dining room at the Four Seasons Hotel in Chicago. Whitacre, Wilson and Mimoto also attended along with their bosses.

The cartel met in Atlanta in January 1995, using a major poultry exposition as camouflage for the producers being in the same place at the same time. The cartel, without the presence of Sewon, decided to cut Sewon out of the agreement for 1995 because of its unrealistic volume demand. Sewon then joined the meeting and agreed to abide by the set price, if not the volume. The group discussed the year-end sales figures for 1994, comparing them to each company's allocated volume, and discussed the new allotment for 1995. According to the 1994 numbers, each company finished fairly close to its allotted volume. The cartel met once more in Hong Kong before the FBI raided the offices of ADM in Decatur and Heartland Lysine in Chicago. These raids ended the cartel. Heartland Lysine immediately notified its home office in Japan of the search, and Ajinomoto began destroying evidence of the cartel housed in its Tokyo office. Mimoto overlooked documents stored at his home and later turned these over to the FBI. Included in these saved documents were copies of internal Ajinomoto reports of the Mexico and Paris meetings.

C. The Investigation

Mark E. Whitacre joined ADM in 1989 as president of its bioproducts division. That year, ADM announced that it would enter the lysine market dominated by Asian producers. Whitacre, who held a Ph.D. in biochemistry from Cornell University and degrees in agricultural science, answered directly to Mick Andreas. Just 32 years old when he joined the company, Whitacre's star clearly was rising fast at ADM, and some industry analysts thought he could be the next president of ADM.

In 1992, Whitacre began working with Wilson, and the two attended the first meetings of the lysine producers in Mexico City. Also in 1992, Whitacre began embezzling large sums of money from ADM and eventually stole at least $9 million from the company by submitting to ADM phony invoices for work done by outside companies, who would then funnel the money to Whitacre's personal offshore and Swiss bank accounts. To cover up the embezzlement, Whitacre hatched a scheme in the summer of 1992 to accuse Ajinomoto of planting a saboteur in ADM's Decatur plant. Whitacre would accuse the saboteur of contaminating the delicate bacterial environment needed for the production of lysine, a story made believable because of the many early difficulties the ADM lysine plant encountered.

In accordance with the plot, Whitacre told Mick Andreas that an engineer at Ajinomoto named Fujiwara had contacted him at his home and offered to sell ADM the name of the saboteur in exchange for $10 million. The story was a lie. However, Dwayne Andreas believed it and feared it could jeopardize relations between the United States and Japan. He called the CIA, but the CIA, considering the matter one of federal law enforcement rather than national security, directed the call to the FBI, which sent agents out to ADM to interview Whitacre and other officials about the extortion. Whitacre apparently had not expected this and realized quickly that his lie would be discovered by the FBI, particularly after Special Agent Brian Shepard asked Whitacre if he could tap Whitacre's home telephone to record the next extortion demand. Whitacre knew that when the extortionist failed to call, Shepard would know Whitacre had invented the story. Whitacre confessed the scheme to Shepard, but to save himself, he agreed to become an undercover informant to help the FBI investigate price fixing at ADM. He did not come totally clean with the FBI, however; he failed to mention the millions he embezzled and in fact continued to embezzle after he began working for the government. For the next two-and-a-half years, Whitacre acted as an undercover cooperating witness—legally a government agent—and secretly taped hundreds of hours of conversations and meetings with Wilson, Mick Andreas and the other conspirators. In addition, the FBI secretly videotaped meetings of the lysine producers.

Whitacre made between 120 and 130 tapes for the FBI during the investigation, beginning with a November 9, 1992, conversation with Yamamoto, by using recording equipment, tapes and instruction provided by the government. FBI agents met with Whitacre more than 150 times during the investigation. The tapes were collected and reviewed usually within a day or two of the FBI receiving them, and Department of Justice (DOJ) attorneys regularly participated in reviewing the tapes and monitoring the supervision of Whitacre. However, the FBI's supervision of Whitacre was not flawless. Whitacre was, to say the least, a difficult cooperating witness to handle. Whitacre lied to the FBI during the probe, failed polygraph tests, bragged to his gardener about his role as an FBI mole, all while continuing to embezzle millions of dollars from the company. He even envisioned himself ascending to the ADM presidency as a hero once Andreas, Wilson and Randall[2] were taken down in the FBI sting. In short, he was out of control, and the FBI struggled to keep him on track. Nonetheless, the FBI and the DOJ considered him the best opportunity to stop a massive price-fixing scheme.

Whitacre exercised much discretion in deciding which conversations to record. He was given a tape recorder that could be hidden in his coat breast pocket and another that could be stowed in his briefcase. Agent Shepard showed him how to use the devices and sometimes affixed a recording device to Whitacre's body. Another recording device was used to tap one of Whitacre's home telephones, but not his cellular telephone. All recordings were done with Whitacre's express, signed consent, and all but one were done after Whitacre confessed that his story about a saboteur was a hoax and he began cooperating.

Whitacre was told to record conversations relevant to the conspiracy, but not to record anything about ADM's legitimate business. In direct contravention of the FBI's recording policy, Whitacre did not record many conversations he had with the alleged conspirators. The record shows Whitacre telephoned Ajinomoto and Kyowa 114 times, but 80 were never recorded or documented by the FBI as required. In addition, many conversations with co-defendants Wilson and Andreas were never recorded or documented.

Whitacre once claimed that Shepard ordered him to destroy tapes bearing exculpatory conversations, but Shepard denied this charge and Whitacre later recanted it in a sworn affidavit. Both Whitacre and a friend he entrusted with some of the tapes testified that no tapes were destroyed at Shepard's command. A tape expert testified for the government that none of the tapes exhibited evidence of splicing or alteration and that only a few showed evidence of "bulk erasure" or over-recording. Although that meant that some recordings may have been taped over, the expert expressed an opinion that none of the final recordings had been altered.

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[2] Randall was not indicted.

Andreas and Wilson moved to suppress the inculpatory tapes before trial and to allow them to introduce evidence that exculpatory tapes had been destroyed. For reasons explained below, the motion was denied although the trial court found that the FBI's supervision of Whitacre and its blatant inability to follow its own internal policies "border on gross negligence."

D. Barrie Cox

As part of its investigation into lysine and citric-acid price fixing by ADM, the government sought to interview Barrie R. Cox, a British national and president of ADM's food additives division in Europe. Cox, who reported directly to Wilson from 1991 through June 1995, was believed to have information regarding a conspiracy to fix prices in the citric-acid market. Prosecutors thought he could help them better gauge the value of ADM's cooperation, which was a factor in determining how high the fine should be when ADM eventually pleaded guilty, a plea which was expected to follow within a week. To avoid extradition problems from Great Britain and to procure Cox's cooperation, the San Francisco antitrust office of the DOJ sent Cox a letter dated October 11, 1996, guaranteeing use-immunity for any information provided by Cox during the interview. The letter stated in part:

> This is to confirm, as set forth in my letter to Mr. William W. Taylor, III, . . . that in connection with the interview of Archer Daniels Midland Company's ("ADM") employee, Mr. Barrie R. Cox, the United

> States acknowledges that statements made by Mr. Cox and information provided by Mr. Cox during the interview are covered by Federal Rule of Criminal Procedure 11(e)(6) and also may not be used directly or indirectly against ADM or any of its employees, subsidiaries or affiliates in any criminal prosecution.

When the letter was sent and Cox was interviewed, the government was in the final stages of negotiating ADM's guilty plea agreement. Rule 11(e)(6) of the Federal Rules of Criminal Procedure prohibits the government from using the following against a defendant who made a plea or participated in plea discussions:

> (C) any statement made in the course of any proceedings under this rule regarding either [a guilty plea that was later withdrawn or a plea of nolo contendere]; or
>
> (D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Based on this guarantee, Cox submitted to the interview. In the interview and later at trial, Cox provided details of the citric-acid conspiracy that showed it to be closely similar in design and function to the lysine conspiracy. Andreas and Wilson moved to suppress Cox's testimony and argued that the government, by its letter to Cox, intended to immunize them as ADM employees, despite the fact that they had already been notified that the government would seek indictments against them. The district court found this argument unpersuasive and denied the motion to immunize Andreas and Wilson or suppress the testimony.

Cox testified that ADM fixed prices and participated in volume allocations in the citric-acid market for at least four years, from 1991 to 1995. Wilson, Cox's superior, was actively involved in the schemes in which citric-acid producers representing about two-thirds of the global market would meet on a regular basis to set prices and agree to sales quotas for each company. Cox testified that before he joined ADM,[3] Andreas asked him if it was possible to arrange a meeting of the competitors in the citric-acid market. Later, Wilson and Cox arranged meetings with the major competitors, who agreed to fix prices and establish volume quotas. The quotas were considered necessary to discourage any cartel member from cutting prices. As in the lysine conspiracy, the allocations were determined by each company's historical sales performance. If any company sold too much, it would be required to buy the following year from the company that sold too little. To monitor the progress of the conspiracy, each company reported its sales monthly to a designated cartel member. Additionally, a trade association was formed to help cover up the cartel's actions. Wilson participated in several of the cartel's meetings.

E. Closing Arguments

In closing argument at the end of the two-month trial, then-Assistant U.S. Attorney Scott Lassar gave his opinion of the sufficiency of the evidence:

> I think that you're going to see—and you probably suspect this already—that the case that has been presented here by the government is one of the most compelling and powerful that has ever been presented in an American courtroom. Why do I make a statement like that? Well, the most powerful evidence you could ever have would be a videotape of the defendant committing the crime. You can't get better evidence than that. You've got it as to defendant Andreas and defendant Wilson.

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[3] Until 1990, Cox worked for a company that produced citric acid. In 1990, ADM bought the citric-acid operation, and Cox joined ADM at that time.

Defense counsel objected to what they considered Lassar's impermissible vouching for the strength of the government's case when he called it "one of the most compelling and powerful that has ever been presented in an American courtroom." The court agreed and gave a limiting instruction to the jury to disregard Lassar's personal opinion.

Lassar also remarked on defendants' responses to the FBI questioning at the time of the raids on ADM in June 1995. At that time, the FBI briefly questioned both Andreas and Wilson. After denying that they committed a crime, both men refused to answer questions without the presence of counsel. At trial, Wilson and Andreas exercised their right not to testify. Lassar characterized the defendants' initial responses by saying, "they lied and lied and lied." He then continued with his closing:

> When the defense attorneys address you, they're going to come up with all kinds of different defenses all over the place. But when you're hearing all those defenses, ask yourselves why didn't we hear those defenses from Mr. Wilson and Mr. Andreas on June 27, 1995? That was their opportunity if they had a defense. They were confronted. That was their opportunity to give all these defenses. You're not going to hear those lies from the attorneys because the attorneys have an advantage over their clients. The attorneys have heard all the evidence the government has. They knew before trial about all those tapes, and so they constructed new defenses for your benefit that they're going to argue to you, not the ones their clients came up with, and that's evidence to you that the defenses you're going to hear are not true because if they were true, you would have heard them given to the FBI by Mr. Wilson and Mr. Andreas in June 1995.

The three defendants argued that Lassar sought to introduce indirectly the defendants' choice not to testify. Judge

Manning strongly rebuked Lassar, but declined to declare a mistrial. Instead, the court instructed the jury to disregard Lassar's impermissible comments.

F. Sentencing

The jury convicted the three defendants on the single-count conspiracy indictment. On July 9, 1999, the court sentenced the defendants. United States Sentencing Guidelines § 2R1.1 mandated a base-offense level of ten and a seven-level increase because the volume of commerce affected was more than $100 million. With criminal histories in category I, the applicable range under the Guidelines for an offense level of seventeen was twenty-four to thirty months. The Presentence Investigation Reports (PSR) recommended a four-level increase for Andreas and three-level increase for Wilson based on their leadership roles in the conspiracy, pursuant to U.S.S.G. § 3B1.1. The court rejected the leadership role enhancements because it found that Wilson and Andreas were no more culpable than their co-conspirators. The court then sentenced each defendant to twenty-four months in prison.

II. ANALYSIS

On appeal, Andreas and Wilson raise ten issues including, among others, challenges to evidentiary rulings, the sufficiency of the evidence and the calculation of their sentences under the Sentencing Guidelines. The government appeals only one ruling, the denial of an upward adjustment for the defendants' leadership roles in the crime.

A. The Tape-Recorded Evidence

1. Admission of Audiotape Evidence

The defendants appeal the district court's decision to admit the tape recordings made by Whitacre on two grounds. First, they claim they were denied due process because evidence showed that the FBI and Whitacre engaged in "selective taping" and destroyed exculpatory tapes, which rendered the tapes unreliable, misleading and the product of bad faith. Second, they allege that the tapes were made in violation of the federal wiretap statute, 18 U.S.C. § 2511. The district court considered and rejected these arguments, and we review that decision for abuse of discretion. *See United States v. Bradley*, 145 F.3d 889, 892 (7th Cir. 1998). The abuse of discretion standard for evidentiary rulings presents a high hurdle for defendants, allowing reversal "only when no reasonable person could agree" with the trial judge, *United States v. Sinclair*, 74 F.3d 753, 756-57 (7th Cir. 1996), and only if the error was not harmless. *See Holmes v. Elgin, Joliet & E. Ry. Co.*, 18 F.3d 1393, 1397 (7th Cir. 1994).

a. Due Process

The defendants claim the admission of the tapes violated their due process rights because the FBI failed to supervise Whitacre adequately, badly mismanaged the two-year taping operation and because Whitacre had ulterior motives for acting as a mole, thereby rendering the tapes so unreliable as to make them constitutionally defective. *See United States v. Feekes*, 879 F.2d 1562, 1564 n.2 (7th Cir. 1989); *United States v. Faurote*, 749 F.2d 40, 44 (7th Cir. 1984). After holding an evidentiary hearing, the trial court denied the defendants' motions to suppress the tape recordings.

In *Feekes*, we expressed in dicta that government conduct in managing an undercover taping investigation could be so outrageous as to "run afoul of the constitutional guarantee of due process." *Feekes*, 879 F.2d at 1564 n.2. As examples, we mentioned selective taping and editing of conversations and deliberate destruction of certain tapes. *Id.* However, we also noted that credibility determinations regarding an informant belong to the jury, not the court, and that it was equally important to consider the total circumstances of the undercover operation in assessing the supposed outrageousness of the government's conduct. *Id.* at 1565. In conducting criminal investigations, law enforcement frequently must rely on unsavory characters, such as Whitacre, whose motives are less than pure. As with all due process analyses, the touchstone consideration is whether the proceeding was fundamentally fair, and selective recording without more does not offend the Constitution. *See United States v. Chaudhry*, 850 F.2d 851, 857 (1st Cir. 1988).

Whitacre's behavior while acting as a cooperating witness can be characterized as troublesome and, at times, criminal. That is to say, he lied, cheated, stole and then lied some more. He failed to follow orders and had delusions of grandeur that would make Napoleon blush. Still, this Court cannot fathom how that affected the accuracy of his recording equipment. The tapes themselves reflect complete conversations and are internally consistent and corroborated by other witnesses. While evidence that an informant selectively failed to record exculpatory evidence would raise due process concerns, the defendants produced no such evidence. Rather, they rely merely on an assumption that because Whitacre was dishonest and sought to benefit from having his superiors convicted, then he must have selectively failed to record exculpatory conversations.

The defendants contend that the FBI granted Whitacre unfettered discretion to choose what to tape, but this mischaracterizes the FBI's instructions to Whitacre. Andreas and Wilson say Whitacre was told to tape incriminating conversations, not conversations regarding legitimate ADM business, and this amounts to an instruction not to tape exculpatory remarks. The FBI's actual instructions were to tape all conversations regarding the conspiracy, which would include inculpatory and exculpatory statements, but to omit conversations about other ADM business. Had the subjects of the investigation had a conversation related to the conspiracy that was exculpatory, Whitacre was under orders to record it. His discretion was not unfettered, nor was he told to do anything improper.

In *Faurote*, we reaffirmed the principle that the party seeking to introduce taped evidence bears the burden of establishing its truth, accuracy and authenticity, and that the trial judge has broad discretion in deciding whether this standard has been met. 749 F.2d at 43. Defendants cannot mount a serious challenge under this standard. The government established the accuracy of the recordings through witnesses who attended the meetings, and defense counsel took full advantage of the opportunity to voir dire and cross-examine these witnesses on the truth, accuracy and meaning of the tapes. A tape expert testified that although some of the tapes had been reused, none of the conversations on the tapes had been altered or edited in any way. We see no "extraordinary circumstances" (in fact, no circumstances whatsoever) that would cause us to reverse the trial court's decision to admit the tapes.

Finally, the defendants contend that the FBI ordered Whitacre to destroy exculpatory tapes, which would undoubtedly violate due process if true. *See California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *United States v. Watts*, 29 F.3d 287, 290 (7th Cir. 1994). To establish such a violation, the defendants must show that (1) the government acted in bad faith by not preserving evidence, (2) the exculpatory nature of the evidence was apparent before its destruction and (3) the defendant cannot obtain the same evidence elsewhere. *See Trombetta*, 467 U.S. at 488-89; *Watts*, 29 F.3d at 290. The defendants produced no credible evidence that any evidence was actually destroyed. Whitacre never claimed he destroyed tapes; rather, he offered but then recanted an allegation that a friend to whom he sent some tapes destroyed them after the FBI told Whitacre to get rid of the tapes. That friend, David Hoech, denied destroying any tapes. It follows that because no evidence was destroyed, its exculpatory nature could not have been apparent before its destruction. Furthermore, because Whitacre recanted his allegation that the FBI ordered him to destroy tapes—an allegation that was far from credible even when made—no evidence indicates bad faith by the government.

b. Federal Wiretap Laws

The defendants further contend that the tape recordings violated federal wiretap laws, and therefore must be excluded from trial based on 18 U.S.C. § 2515, which prohibits the evidentiary use of any illegally obtained tape recording. Two exceptions to § 2515 potentially apply. First, § 2511(2)(c) allows the use of tape recordings made by a participant to the conversation who was "acting under color of law." 18 U.S.C. § 2511(2)(c). Second, § 2511(2)(d) allows the use of recordings made by participants in a conversation unless that party had a "criminal or tortious" purpose in making the recording. 18 U.S.C. § 2511(2)(d). Because we find that Whitacre acted under color of law, we do not need to reach the second possibility.

The government asserts that Whitacre was acting as a cooperating witness, and therefore under color of law, from November 1992 through the end of the conspiracy. *See Obron Atlantic Corp. v. Barr*, 990 F.2d 861, 864 (6th Cir. 1993) (allowing use of tape recordings made by corporate executive in price-fixing investigation); *United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984) (holding that cooperating witness under direction of FBI was acting under color of law); *United States v. Horton*, 601 F.2d 319, 322 (7th Cir. 1979) (holding that tapes made by FBI informant were admissible under § 2511(2)(c)-(d)); *United States v. Craig*, 573 F.2d 455, 476 (7th Cir. 1977) (holding that informant acted under color of law when FBI supervised recording). Andreas and Wilson counter that the FBI's supervision of Whitacre was so lax as to strip him of this status.

In *Craig*, we noted several factors in the government's supervision of an informant that indicated the government directed the recording. 573 F.2d at 476. In that case, such factors included whether the government supervised every aspect of the recording, selected the conversations to be recorded, supplied and operated the equipment, and recovered the tapes and equipment after each session. *Id.* We did not suggest that these factors were necessary to a finding that the witness acted under color of law, only that they were sufficient. *Id.* Therefore, their absence in the instant case, while probative, is not dispositive.

Defendants cite dicta in *Thomas v. Pearl*, 998 F.2d 447, 451 (7th Cir. 1993), for the proposition that because police officers "who secretly taped conversations without a warrant or the approval of their superiors" would not be acting under color of law, then *a fortiori*, a private citizen acting without a warrant or the approval of superiors cannot be. In Thomas, we were comparing the "color of law" provision from the wiretap statute with the way the term has been interpreted in cases arising under 42 U.S.C. § 1983. In civil rights cases, we have interpreted the term very broadly, equating it with state action. In Thomas, we held that such a broad reading of "color of law" in the wiretap statute would be nonsensical because it would permit every government employee to tape with impunity, regardless of their purpose. 998 F.2d at 451. We used the example of police officers acting in violation of the Fourth Amendment to make the point that government employment by itself does not mean acting under color of law for purposes of the wiretap statute. *Id.* Here, the government does not contend that Whitacre was acting under color of law because he was a government employee. *Thomas*, then, is of only marginal relevance.

Rather, when assessing whether someone acted under "color of law" for the wiretap statute, the question is whether the witness was acting under the government's direction when making the recording. *See Craig*, 573 F.2d at 476; *see also Obron Atlantic*, 990 F.2d at 864; *Haimowitz*, 725 F.2d at

1582; *United States v. Shields*, 675 F.2d 1152, 1156-57 (11th Cir. 1982); *United States v. Tousant*, 619 F.2d 810, 813 (9th Cir. 1980). No cases demand that the government's supervision of its cooperating witnesses and informants need be flawless. In fact, the investigation in Obron Atlantic suffered many of the same defects as the ADM investigation. 990 F.2d at 863. The mole in Obron Atlantic used his own equipment, decided which calls to tape, failed to maintain a log of his recordings and sometimes held on to tapes for weeks or months before turning them over. *Id.* The court found that the witness's "continuous, albeit irregular, contact [with] DOJ attorneys, following their explicit request that he assist them in this very way and their instructions on how to conduct the calls, outweighs the lack of direct DOJ supervision over the recording process and [his] failure to comply with certain directives." *Id.* at 865. What we find essential is that the government requested or authorized the taping with the intent of using it in an investigation and that they monitored the progress of the covert surveillance activities.

To be sure, the FBI's supervision of Whitacre's surreptitious taping activities will likely never make it into the textbooks. The defendants make use of the technical errors in the supervision to paint a picture of a rogue witness, completely out of control, acting alone, throwing away tapes and manipulating evidence with callous indifference. Many conversations between Whitacre and one or more conspirators that should have been recorded were not, and the FBI frequently did not file the necessary reports or provide explanations for these missed conversations. Many of the tapes Whitacre made were not collected as promptly as they should have been, and the catalogue of tapes given to and collected from Whitacre was not meticulously maintained. The FBI did not seem to follow its own internal guidelines on supervising taping activities, but this does not provide a basis for constitutional challenge. *See United States v. Caceres*, 440 U.S. 741, 752 (1979) (holding that a breach of administrative guidelines does not establish a constitutional violation automatically).

Still, these technical deficiencies do not show Whitacre acting independently of the FBI. FBI agents requested Whitacre begin taping his coconspirators, instructed him on what type of conversation to record, supplied him with taping equipment and tapes, instructed him on the proper use of the equipment and met with him regularly to discuss developments in the conspiracy and collect the tapes. When possible, the FBI itself monitored the conversations by setting up remote-controlled video recorders to tape the face-to-face meetings of the conspirators and having FBI agents act as hotel staff to infiltrate the meetings. As in Craig, this evidence was sufficient to prove that Whitacre acted at the direction of the FBI in gathering the tapes, and therefore acted under color of law.

2. *Evidence of Exculpatory Audiotapes*

Wilson and Andreas next contend that the trial court's decision to exclude the testimony of Special Agent Athena Varounis denied them the use of potentially exculpatory evidence. The defendants believe that Varounis would have testified about her investigation of claims by Whitacre and his wife that the FBI instructed Whitacre to destroy exculpatory tapes. On April 16, 1997, after he learned he would be indicted, Whitacre and his wife, Ginger Whitacre, met with Varounis in Chicago and alleged that Agent Shepard told him to destroy tapes. Whitacre later recanted the allegation, but Wilson and Andreas sought to introduce it as hearsay pursuant to Rule 804(b)(3) of the Federal Rules of Evidence as a statement against penal interest. Whitacre exercised his Fifth Amendment right not to testify at trial, making him unavailable to testify, so defendants sought to have Varounis recount Whitacre's statements to her regarding the FBI's alleged order to destroy evidence. The trial court refused to allow the testimony because the statements were not, on balance, against Whitacre's penal interest when made and were not adequately corroborated.

To be admissible under Rule 804(b)(3), a statement must have been against the declarant's penal or pecuniary interest at the time it was made, must be corroborated to ensure its trustworthiness and the declarant must be unavailable to testify. *See United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990); *see also Williamson v. United States*, 512 U.S. 594 (1994). Courts must look to the totality of circumstances to determine whether the declarant truly exposed himself to criminal liability by making the statements. *See United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995).

The trial court found that Whitacre's statements were not credible when made and were contradicted by other evidence. Hoech, the friend to whom Whitacre supposedly sent the tapes, testified that he did not destroy any tapes, and other evidence showed Whitacre's story to be a poorly constructed hoax. For instance, Whitacre claimed the order to destroy evidence came during a meeting in Illinois on a day when records show Whitacre was out of the state. Varounis found no evidence that any tapes had been destroyed. Whitacre himself recanted the allegation in a sworn affidavit before being sentenced for embezzlement. Whitacre's propensity to lie cannot be doubted, and the court chose not to accept his (by then recanted) story over contradictory statements of other witnesses.

Andreas and Wilson contend that Whitacre's statements to Varounis indicate Whitacre obstructed justice and were therefore against his penal interest, but it is unclear how this could be true. Whitacre, who was about to be charged with conspiring to violate the antitrust law, and Whitacre's wife said only that the FBI instructed him to destroy tapes, and he denied that he ever actually destroyed evidence. Furthermore, because Whitacre was acting as a government agent since November 1992, none of the tapes could have been inculpatory as to him. Therefore, by claiming the FBI ordered tapes destroyed, he did not damage his own defense against the antitrust conspiracy charge at all, but he delivered a potentially crippling blow to the FBI agents' credibility at trial. Since Whitacre's antitrust conviction would be based largely on FBI and co-conspirator testimony regarding the pre-November 1992 events, this tactic could have been a major boon to him in fighting his own conspiracy charge. Whitacre may also have preferred conviction on the less serious charge of obstructing justice rather than face a longer prison term for criminal conspiracy. Judge Manning correctly found that, on balance, the Whitacres' allegations of evidence tampering were not against Whitacre's penal interest. The trial court did not abuse its discretion in barring Agent Varounis' testimony.

B. Barrie Cox

1. The Immunity Agreement

The government and Cox entered into a use immunity agreement to facilitate Cox's interview with the FBI and the DOJ in preparation for ADM's impending plea agreement, which would settle all charges against the corporation. At all times, the government was preparing to prosecute Wilson and Andreas criminally, which makes the defendants' request that this Court interpret the Cox immunity agreement (the "agreement" or "letters") to immunize them truly remarkable. They contend that this absurd result follows from a logical chain beginning with the government's intent to immunize Andreas and Wilson, even though Andreas and Wilson were the prime individual targets of the government's three-year investigation. The defendants contend they are third-party beneficiaries of the agreement and that because the government cannot present an entirely independent source for Cox's testimony, the indictment must be dismissed, or at the very least, Cox's testimony regarding the citric-acid conspiracy should have been suppressed. We decline to take the first step down this too clever road.

Without deciding whether third parties can ever be immunized by another's compelled testimony,[4] we agree with the district court that Wilson and Andreas do not have standing to enforce the terms of the Cox agreement. Immunity agreements, like plea bargains, are interpreted as ordinary contracts in light of the parties' reasonable expectations at the time of contracting. *See Wilson v. Washington*, 138 F.3d 647, 652 (7th Cir. 1998); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985). Individuals who are not parties to a contract may enforce its terms only when the original parties intended the contract to directly benefit them as third parties. *See* Restatement (Second) of Contracts § 304 (1979); *Holbrook v. Pitt*, 643 F.2d 1261, 1270 (7th Cir. 1981) ("Under settled principles of federal common law, a third party may have enforceable rights under a contract if the contract was made for his direct benefit."); *see also Carson Pirie Scott & Co. v. Parrett*, 178 N.E. 498, 501 (Ill. 1931).[5] A contract creates a right in a third-party beneficiary if recognition of that right effectuates the intent of the parties and the "circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 304;

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[4] *Kastigar v. United States*, 406 U.S. 441 (1972), and its progeny, including *United States v. Palumbo*, 897 F.2d 245 (7th Cir. 1990), deal with the use of evidence against defendants obtained from *those defendants* pursuant to an immunity agreement. Here, the defendants who seek to benefit from the immunity agreement have not testified nor have they ever entered into any agreement. They cannot claim to have been induced into testifying against themselves and can point to no violation of the Fifth Amendment, as in *Kastigar* and *Palumbo*.

[5] Federal courts look to general principles of contract law to interpret a plea or immunity agreement. *See United States v. Given*, 164 F.3d 389, 395-96 (7th Cir. 1999). The parties focus on Illinois law, which fairly typifies the general law of contracts and is persuasive in this instance.

Holbrook, 643 F.2d at 1271 n.17 (adopting the Second Restatement definition); *see generally Cahill v. Eastern Benefit Sys., Inc.*, 603 N.E.2d 788, 792-93 (Ill. App. Ct. 1992) ("The critical inquiry centers on the intention of the parties, which is to be gleaned from the language of the contract and the circumstances surrounding the parties at the time of its execution.") (citing *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 400 N.E.2d 918, 919 (Ill. 1980)).

In this case, the circumstances conclusively establish that neither the promisee (Cox) nor the promisor (the government) intended to give Andreas and Wilson any benefit of the promise since both knew Andreas and Wilson specifically would be excluded from the plea deal. In October 1996, the government was in the final stages of negotiating a plea agreement with ADM that would end the investigations into the corporation's responsibility for antitrust violations in the lysine and citric-acid industries. The plea agreement included a statement that "the United States agrees: (a) not to bring charges against any current director, officer or employee of the defendant or any of the defendant's subsidiaries or affiliates (other than Michael D. Andreas and Terrance Wilson)." In exchange for the plea, ADM agreed to pay a $100 million fine and cooperate (and allow its employees to cooperate) with the government. In the October 11 letter to Aubrey M. Daniel, attorney for ADM, the DOJ expressly conditioned the plea on "the cooperation of ADM's employees with the investigation and *resulting prosecutions*." (Emphasis added.)

The DOJ sought Cox's testimony in advance of the plea hearing to help it "assess the value of ADM's proffered cooperation." The government had agreed that if ADM's cooperation was especially helpful, it would not seek a higher fine under the Sentencing Guidelines. Both letters expressly referenced Rule 11(e)(6) of the Federal Rules of Criminal Procedure, placing the letters squarely in the context of the impending plea agreement, which expressly excluded Andreas and Wilson.

The letter to ADM's attorney (the "Daniel letter") incorporated the letter to Cox's attorney, Taylor (the "Taylor letter"). The Taylor letter specifically referenced the proposed plea agreement of ADM and expressed the understanding of the United States that "the interview is being conducted in the course of our plea discussions with your clients' employer, ADM." The Daniel letter, like the Taylor letter, further refers to the Federal Rules of Criminal Procedure. The references to the plea negotiations and the plea agreement express the intent of the parties to execute an immunity agreement to protect Cox, ADM and all ADM employees except for Andreas and Wilson, from prosecution based on Cox's testimony.

The text of the letters and the circumstances surrounding them do not evince an intent to vest third-party rights in Andreas and Wilson. To the contrary, the evidence demonstrates an intent to exclude Andreas and Wilson from any benefit of the agreement. Because they are not parties or third-party beneficiaries, we hold that Wilson and Andreas do not have standing to enforce the terms of the immunity agreement.[6]

2. Citric-Acid Conspiracy Evidence

Defendant Andreas objected to the admission of Cox's testimony regarding the citric-acid conspiracy as unduly prejudicial. Andreas contends that no evidence showed he had been involved in the citric-acid conspiracy, and therefore it could not be admitted against him under Rule 404(b) of the Federal Rules of Evidence, which allows evidence of other crimes or bad acts to be used to show a defendant's motive, plan or intent in the instant crime. Rule 404(b) strictly prohibits the evidence of other crimes or bad acts to support the inference that the defendant has a propensity to commit that type of crime, but we do not believe that happened here. First, Andreas contends vigorously that the evidence of the citric-acid conspiracy fails to implicate him in any crime, including the citric-acid conspiracy, so it follows that the potential for an impermissible inference regarding his character must be nil. However, we find an alternative basis for allowing Cox's testimony.

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[6] The analysis and resolution of this issue overlaps with the question of whether, assuming standing, the terms of the agreement actually immunized Andreas and Wilson. We also would answer that question in the negative.

Rule 404(b) guards against the impermissible inference that because a defendant committed Crime A at some time in the past, he is more likely to have committed Crime B, the crime charged in the present. The risk that the jury may improperly comprehend and weigh evidence of prior bad acts looms so large that courts in this country have long forbidden the government from invoking it. *See Victor J. Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 Wash. L. Rev. 497, 524-30 (1983). Yet we have carved out two important categories of cases where the rule does not apply. The first, and most common, is expressly stated in the rule itself, and that allows the use of other crimes evidence for purposes other than to show a propensity to commit the crime, such as to show the defendant's motive, plan or intent. See Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .").

The second exception, which applies here, covers acts that are so intricately interwoven with the facts of the charged crime that to omit the evidence relating to it would lead to confusion or leave an unexplainable gap in the narrative of the crime. *See United States v. Akinrinade*, 61 F.3d 1279, 1285-86 (7th Cir. 1995). While not an express exception to Rule 404(b), this type of evidence is permitted by virtue of not being included within the province of the rule. "Other crimes or acts" does not include those acts that are part and parcel of the charged crime itself; they simply are not "other." To omit the evidence would leave unanswered some questions regarding the charged offense. Such evidence includes acts that although not charged as crimes, "are directly related to the charged offense." *United States v. Adames*, 56 F.3d 737, 742 (7th Cir. 1995). "[T]he question is whether the evidence is properly admitted to provide the jury with a complete story of the crime . . . ." *United States v. Ramirez*, 45 F.3d 1096, 1102 (7th Cir. 1995) (internal quotation omitted).

Andreas' situation mirrors *Adames*. That case involved a drug conspiracy in which one of the defendants, Adames, had been caught in a drug sting operation in Texas (the "Texas sting") unrelated to his co-defendants in the charged offense. *Adames*, 56 F.3d at 741. However, the Texas sting prevented Adames from delivering the promised amount of marijuana and caused other changes in the conspirators' plan. The codefendants moved to exclude evidence of the Texas sting on the ground that it was a separate, extraneous conspiracy that did not implicate them at all. Like Andreas, they also moved to exclude on the basis that even if allowable under Rule 404(b), it would be unduly prejudicial and should be barred by Rule 403.

The trial court found, and we agreed, that the Texas sting was sufficiently linked to the charged offense to be admitted notwithstanding Rule 404(b). *Id.* at 742. The Texas sting provided direct evidence of the crime charged and therefore could not be considered "other crimes" evidence. Furthermore, the Texas sting was not so shocking, repulsive or emotionally charged that its probative value was outweighed by its prejudicial effect. We noted that probative evidence is always prejudicial, but the question remains whether it is unfairly prejudicial. *Id.*

The evidence of the citric-acid conspiracy answered at least three relevant questions. First, the jurors heard the conspirators in tape-recorded meetings discussing the citric-acid conspiracy, and they heard Wilson explaining that certain aspects of the lysine conspiracy, such as the bogus trade association, would operate in the same way. The evidence of the citric-acid conspiracy was relevant to explain these references in the conspirators' conversations.

Second, testimony at trial showed that in the halls of ADM's Decatur headquarters, the lysine and citric-acid conspiracies were closely related parts of a master plan to control prices and product supply through collusion with competitors. The citric-acid conspiracy, of which Andreas was aware, provided the blueprint for and motivating force behind the nascent lysine scheme. Many of the lysine cartel's meetings revolved around the need to allocate sales volume, a lesson dictated by the experience in the citric-acid conspiracy.

Finally, omitting the citric-acid evidence would leave Wilson's participation in the lysine conspiracy unexplained. Wilson—head of the corn division—was called in to work on the bioproducts project solely because he had experience with cartels that he gained from the citric-acid conspiracy. Wilson was to tutor Whitacre in running a citric-acid type conspiracy. The inference cannot be missed that since Wilson reported directly to Andreas, Andreas must have known why his corn processing chief was working so closely and traveling so much with the bioproducts chief. Because Wilson's entire reason for getting involved in lysine was to share his criminal experience with Whitacre, it takes little imagination to see how evidence of the citric-acid conspiracy implicated Andreas. To omit this evidence would, as in *Adames*, leave an unexplained gap in the narrative of the crime. We find the evidence of the citric-acid conspiracy was relevant to Andreas' guilt and not unfairly prejudicial.

C. Per se *Violations*

The grand jury indictment charged the defendants with engaging in a "conspiracy to suppress and eliminate competition by fixing the price and allocating the sales volumes of lysine . . . the substantial terms of [the conspiracy] were: (a) to agree to fix and maintain prices . . . and (b) to agree to allocate the sales volumes of lysine among the corporate conspirators." The government's theory of the case held that the conspirators sought to raise prices by two independent but related means—price fixing and volume agreements—either one of which would accomplish the ultimate goal of the conspiracy. The court instructed the jury that it could convict the defendants of violating § 1 of the Sherman Antitrust Act if it found the defendants entered into an agreement *either* to fix prices or to "divide sales of a product among the various competitors." The defendants moved for acquittal on the sales volume portion of the indictment, arguing that it could not be considered a *per se* antitrust violation. The court denied the motion and a subsequent renewed motion for acquittal following the conviction. We review *de novo* a denial of motion for acquittal, but view the evidence in the light most favorable to the government. *See United States v. Hach*, 162 F.3d 937, 942 (7th Cir. 1998).

On appeal, Wilson and Andreas contend that the jury instruction impermissibly allowed the jury to convict them for allocating sales volumes without requiring the government to prove with economic evidence that such an allocation unreasonably restrained trade. Violations of § 1 require evidence proving that the charged practice had the effect of unreasonably restraining trade under the "rule of reason," except in the limited cases referred to as *per se* violations. *See White Motor Co. v. United States*, 372 U.S. 253, 261-62

(1963); *see also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 7-8 (1979). *Per se* violations are ones that "always or almost always tend to restrict competition and decrease output" such that the court may dispense with the requirement of economic evidence. *Id.* at 19-20. *Per se* violations are "naked restraints of trade with no purpose except stifling of competition," *White Motor*, 372 U.S. at 263, and have been characterized as so "plainly anti-competitive" and lacking "any redeeming virtue" that they are presumed illegal under § 1. *See Broadcast Music*, 441 U.S. at 8 (internal quotations and citations omitted). Courts apply *per se* treatment only after "considerable experience" with a particular business practice has inevitably resulted in a finding of anticompetitive effects. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983). The defendants do not contend that price fixing is not a *per se* violation, only that the agreement to allocate sales volumes, which according to the indictment and jury charge was a separate and independent goal of the conspiracy, should be subject to rule of reason analysis. We will reverse jury verdicts in multiple-goal conspiracies when the potential exists that the jury convicted the defendant on an improper ground. *See United States v. McKinney*, 954 F.2d 471, 475 (7th Cir. 1992).

The issue then is whether the agreement to divide the market among the five lysine producers constituted a *per se* violation of the Sherman Act. The defendants' argument relies heavily on the fact that neither the words "sales volume allocation" nor any practices precisely identical to their scheme appear in the case law as a *per se* violation. The agreement did feature some clever characteristics that the conspirators hoped would help them avoid detection, but these small differences are not sufficient to distinguish their plot from more common *per se* prohibited practices. For instance, a conventional illegal agreement to allocate particular customers raises a strong chance that the customers themselves would become suspicious when the customers found that they could not buy the product from certain companies. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988). The lysine cartel's plan avoided this risk by allowing the customer to choose from whom to buy. Because the product was entirely fungible and priced equivalently, the source of the product did not matter to either consumers or suppliers, so the customers' choices mattered little until the end of the year.

Other types of market divisions, such as those based on geography, *see, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), or product lines, made little sense and were unnecessary for this particular industry. Similarly, a conventional illegal agreement to limit industry output, *see, e.g., Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 226 (7th Cir. 1978), would be less desirable since the conspirators believed market demand was growing. So long as the lysine price remained high, it served the conspirators' best interests to allow for market growth, and the agreement adequately accounted for divvying up that growth.

Yet the fact that the lysine producers' scheme did not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment. At bottom, the lysine cartel's agreement was a conspiracy to limit the producers' output and thereby raise prices. Functionally, an agreement to restrict output works in most cases to raises prices above a competitive level, *see General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984), and for this reason, output restrictions have long been treated as *per se* violations. *See Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 (1984); *Socony-Vacuum*, 310 U.S. 150, 223. A prototypical output restriction raises prices by reducing supply below demand. Here, the volume division among the lysine competitors restricted competition over those sales that would lower the commodity price.

Putting aside for a moment the provision for market growth, the sales volume allocation divided the market's expected demand among the five companies on an annual basis. Each agreed not to sell more than their allotment. If after eleven months of a given year, a producer had reached its allocation, the agreement would require it to turn down any additional sales, thereby limiting its output. If it did not stop sales, the agreement required the over-limit producer to purchase an amount equal to its excess from a producer who had fallen short. This would erase the effect of the surplus sales, returning the producer to a state as if it had limited its output.

The agreement allowing for market growth did not change the essential nature of the sales volume allocation as a volume limitation; it merely allowed for per-producer volume limits in a growing market. An output limitation in a static market might give each producer a specific tonnage that it could sell. In a growing market, an output limitation could achieve the same end by giving each producer a specific tonnage plus a proportionate share of the growth. Although no one could know exactly how much the market would grow until the final numbers were in, fairly good estimates could be made, and any errors could be corrected at the year-end accounting. This meant that, as in the static market scenario, a producer that reached its expected limit by the start of the eleventh month would be prohibited from making any additional sales. The volume agreement, then, limited competition over those sales that would lower the price, and as we said in *General Leaseways*, 744 F.2d at 594, such an agreement can be treated as a *per se* offense.

The conspirators began discussing the volume limits at their first meeting in Mexico City when Wilson proposed the idea and explained its vital importance to the overall scheme to control the industry. Ajinomoto, ADM and the others began haggling over how much each would be allowed to produce. This argument continued until Andreas and Yamada met in Irvine, and Andreas threatened to flood the market unless Ajinomoto agreed to the volume limits. The conspirators left this meeting with an agreement that Ajinomoto would sell 84,000 tons of lysine and ADM would sell 67,000 tons, with adjustments for expected growth in the market. This agreement constituted an output limitation, which long has been condemned as a *per se* violation of the Sherman Act. Therefore, the jury instruction correctly advised the jurors of the required elements of a § 1 violation.

Although output limitations have been treated under the *per se* rule, the Supreme Court has recognized special circumstances when horizontal agreements on production could be pro-competitive and therefore treated under rule of reason analysis. *See NCAA*, 468 U.S. at 117; *Broadcast Music*, 441 U.S. at 19. In these case *[sic]*, output limitations have been shown to be potentially pro-competitive because of the unique nature of the product involved, and therefore the cases merited rule of reason treatment. In *NCAA*, the output restriction addressed declining fan attendance caused by widespread television coverage of the athletic contests. Without some restriction on television coverage, the schools feared they would lose too much ticket-based revenue to continue holding games at all.

Here, the district court found nothing in the record that rose to the level of the special circumstances in *NCAA* and *Broadcast Music* to warrant departure from *per se* treatment. Nothing suggests that a market allocation was necessary to maintain a competitive industry. In contrast to *NCAA*, where each school's athletic program relied on the continued existence of competing schools to stage intercollegiate games, each lysine competitor could have continued selling its product without the others. While market demand might not support the full production of five companies at a profitable price, this fact does not distinguish lysine from many other markets. ADM's entrance into the market may have resulted in oversupply and lower prices for consumers, but this does not grant a license to violate the antitrust laws.

D. Intent Requirement

Andreas and Wilson next appeal the district court's refusal to give a requested instruction highlighting their defense theory on intent. The defendants argued at trial that whenever they seemed to be agreeing and conspiring with their competitors to violate the antitrust laws, they were actually playing a clever game of deception. By pretending to agree, they sought to put the Asian companies at a disadvantage so that they would share information and fall into a false sense of security, while ADM aggressively pursued new customers. Their proposed intent instruction would have advised the jury that an agreement does not exist if "one party did not intend to abide by the agreement." We review *de novo* a district court's decision to give or not to give a jury instruction, *see United States v. Brack*, 188 F.3d 748, 761 (7th Cir. 1999), but review the language of an instruction with great deference, upholding instructions that "are accurate statements of the law and which are supported by the record." *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997) (quoting *Doe v. Johnson*, 52 F.3d 1448, 1456 (7th Cir. 1995)).

We agree that a defendant's subjective intent is a required element of a criminal antitrust violation, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 434-36 (1978), and that a defendant who pretended to agree but did not intend to honor the agreement could not be convicted of a crime. *See United States v. Bestway Disposal Corp.*, 724 F.Supp. 62, 67

(S.D.N.Y. 1988). However, we reject the defendants' claim of error for two reasons.

First, the defendants' theory was not supported by any evidence in the record. A defense jury instruction must be given only if "the instruction reflects a theory that is supported by the evidence." *United States v. Fawley*, 137 F.3d 458, 468 (7th Cir. 1998) (citation omitted). Andreas and Wilson presented no evidence, nor did any emerge during the government's case in chief, that they never intended to abide by the agreements. In fact, all evidence showed they *fully* intended to abide by the agreement. Some of the witnesses testified to distrust among the conspirators, but the evidence showed a lack of trust in their co-conspirators to abide by the agreement, not a lack of intent that they themselves would abide by it. The conspirators actually instituted verification measures to force each other to abide by the terms of their agreement and eliminate the potential incentive for themselves and each other to cheat. ADM, through Wilson and Whitacre, proposed these verification measures, belying any reasonable possibility that they intended to cheat.

Second, the jury instructions as given adequately covered this possible defense theory. A defense jury instruction must be given only if "the instruction reflects a theory which is not already part of the charge." *Id.* The district court instructed the jury:

> [Y]ou must determine whether the evidence shows beyond a reasonable doubt that the defendant knowingly and intentionally became a member of the charged conspiracy to fix prices and allocate sales volumes. "Knowingly" means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident.
>
> In order to find that the defendant acted knowingly, you must find that he voluntarily and intentionally became a

> member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it.

A supposed conspirator who only pretended to agree to abide by an agreement would not "know[ ] of its goal and intend [ ] to help accomplish it." If the jury had a reasonable doubt whether Wilson, Whitacre and Andreas intended to abide by the agreement, this instruction would prevent the jury from convicting them.

The defendants sought an instruction that explained their theory in much more argumentative detail, but the court was under no obligation to render it. *See Brack*, 188 F.3d at 761; *United States v. Given*, 164 F.3d 389, 394 (7th Cir. 1999). *U.S. Gypsum* requires reversal when the instruction allows conviction on an incorrect theory of the law. 438 U.S. at 446. For example, the district court in *U.S. Gypsum* gave an instruction that allowed the jury to convict the defendant entirely on an anticompetitive "effects" theory, which did not require a finding of criminal intent at all. *Id.* at 434-36. The Supreme Court reversed because the "effects" instruction did not adequately reflect the statute and held that criminal intent required both an intent to enter the agreement and an intent to effectuate the goal of the conspiracy. *Id.* In contrast, the district court's instruction in this case that the defendants must have intended to "help accomplish" the known goal of the conspiracy is entirely consistent with the reasoning and holding of *U.S. Gypsum.*

E. Sufficiency of the Evidence

Andreas next asks us to overturn the jury's verdict because there was insufficient evidence to support it. We will overturn a jury verdict "only if the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Agostino*, 132 F.3d 1183, 1192 (7th Cir. 1997). We view "the evidence in the light most favorable to the prosecution," and decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Agostino*, 132 F.3d at 1192 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Andreas attended three meetings of the conspirators and served a vital role in the successful efforts to reach an agreement to implement the price-fixing and volume deals. The jury viewed videotape recordings of Andreas' meetings with the admitted co-conspirators and heard Andreas threaten to flood the market if they did not agree. Evidence at trial indicated that the details of the plan were arranged by upper management, but that all sides recognized that their corporate superiors remained in control of the deal and would be called in to settle any unresolved disputes. This in fact happened when the conspirators could not reach an agreement on output; Andreas and Yamada were called in as the deal closers, and they succeeded in that role. At the Irvine meeting, Andreas expressed his concerns about the management of the Asian firms in regard to whether they would be able to carry out their part of the price-fixing scheme. A jury rationally could understand Andreas' words at this meeting only to indicate his knowledge of, participation in and control of the entire plot.

Furthermore, Andreas directly supervised Wilson and Whitacre. They reported the results of the meetings to him, and he on more than one occasion coached them on what to say at an upcoming meeting. Evidence showed Andreas knew that the conspirators were working on a price deal and a volume deal and gave Whitacre orders on how to set up the volume agreement. In an April 1993 conversation heard by the jury, Andreas called Whitacre into his office before a meeting of the cartel and told Whitacre to pretend he was Yamada. Andreas then rehearsed for Whitacre what he would say to Yamada: "We go over there and say to 'em like we've thought it over carefully. Uhm, we know that you feel that we shouldn't be at the same size as you at this stage . . . we've decided that the best thing for the industry would be that you and I decide that we will stay the same size." The FBI also caught Andreas on tape threatening the Asian companies and insisting on how he thought the volume production should be divided.

It would require a great leap of imagination to believe that Andreas knew nothing of the illegal deals on price and output carried out by his direct subordinates, yet happened to play a key role in Irvine and at subsequent meetings to facilitate those deals. The jury apparently, and reasonably, considered insincere and facetious Andreas' occasional statements that ADM would not do anything illegal at a time when he was actively playing a vital role in achieving a criminal purpose. In fact, the jury heard the conspirators laughing when Wilson reported Andreas' "we don't make deals" statement. None of the conspirators believed this, and the jury certainly was not required to believe it either. Based on the overwhelming evidence presented at trial, we cannot conclude that the jury acted irrationally in convicting Andreas of conspiring to restrain trade.

F. Closing Arguments

The government's closing argument twice prompted objections related to improper comments, requiring the trial court to assess the damage done to the fairness of the proceedings. After a thorough analysis, the court refused to declare a mistrial, admonished the government and instructed the jury appropriately. The defendants appeal the denial of a mistrial on two grounds.

1. Vouching

The defendants contend that lead prosecutor Scott Lassar impermissibly vouched for the strength of the government's case. In closing argument, Lassar characterized the case against the three defendants as "one of the most compelling and powerful that has ever been presented in an American courtroom." The trial court agreed with the defense, but declined to declare a mistrial after finding the comment to be harmless. We review for abuse of discretion a trial court's refusal to grant a mistrial. *See United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997).

In cases of prosecutorial misconduct during argument, we determine first whether the prosecutor's comment considered by itself was improper and then examine the entire record to see if the improper comment deprived the defendants of a fair trial. *See United States v. Severson*, 3 F.3d 1005, 1014 (7th Cir. 1993). As the Supreme Court has repeatedly said, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned . . . The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal citations omitted).

Vouching occurs when the prosecutor interjects his personal opinion about the credibility of a witness or the strength of the evidence as a whole. *Rodriguez v. Scillia*, 193 F.3d 913, 919 (7th Cir. 1999); *United States v. Alexander*, 163 F.3d 426, 429 (7th Cir. 1998). In such a situation, vouching introduces credibility evidence that would have been inadmissible during trial. However, a prosecutor may draw reasonable inferences from the evidence adduced at trial, even going so far as to call a defendant a liar if the record supports that accusation. *See United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992); *see also Morgan*, 113 F.3d at 89 (holding that a prosecutor calling a witness an "honest citizen" was a fair inference from the record).

Looking at the comment in isolation, two reasonable interpretations of Lassar's comments emerge.[7] The "most compelling and powerful" case remark came amid Lassar's discussion of the type of evidence used in the case, evidence that arguably caught the defendants red-handed. Most criminal cases do not feature the defendants committing the crime on camera, so the prominent use of that type of evidence could be considered the "most compelling and powerful" type of evidence used in a court in America. In fact, Lassar told the jury "the most powerful evidence you could ever have would be a videotape of the defendant committing the crime. You can't get better evidence than that." Lassar's comment that this was among the "most compelling" *cases*, could fairly have been interpreted as meaning the case featured among the "most compelling" *types of evidence*.

Alternatively, a jury could interpret Lassar's remarks as expressing his personal opinion about the strength of the evidence compared to the many other cases prosecuted in America, the vast majority of which result in convictions. The influence of his opinion could not help but be bolstered by his status as a seasoned prosecutor and the newly appointed United States Attorney for the Northern District of Illinois. By this comment, Lassar did not merely suggest to the jury what he thought they might find when examining the evidence, a type of comment that we have approved although it steps close to the line of impermissible argument. *See Whitaker*, 127 F.3d at 606-07. He introduced a comparison that invited the jury to rely on his experience as a prosecutor while preventing any real response from the defense.

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[7] The government's argument that the prefatory "I think that you're going to see" saves an otherwise impermissible statement is unavailing. This court has allowed a prosecutor to begin with phrases such as "I believe that you will find" because it only suggests what the government thinks the evidence adduced at trial means. *See United States v. Whitaker*, 127 F.3d 595, 606-07 (7th Cir. 1997). "I believe" and "I think" are but patterns of speech that can be innocuous. Such phrases, however, do not automatically immunize any statement that follows.

Where there are two reasonable interpretations of a prosecutor's conduct—one proper and one improper—we cannot say that the trial court abused its discretion in finding it to be improper. *See United States v. Cheska*, 202 F.3d 947, 950 (7th Cir. 2000) (holding that discretion is abused only when no reasonable person could agree with the trial court's assessment) (citations omitted). Here, the trial court's judgment that Lassar improperly vouched for the government's case was reasonable and therefore not an abuse of discretion.

We next look to see whether the remark deprived the defendants of a fair proceeding when considered in the context of the whole trial. *See Alexander*, 163 F.3d at 429-30; *United States v. Reed*, 2 F.3d 1441, 1450 (7th Cir. 1993). To guide us in this decision, we consider five factors: (1) the nature and seriousness of the statement; (2) whether defense counsel invited it; (3) whether the district court sufficiently instructed the jury to disregard it; (4) whether defense counsel had the opportunity to respond to the improper statement; and (5) whether the weight of the evidence was against the defendant. *See Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir. 1995); *United States v. Johnson-Dix*, 54 F.3d 1295, 1304 (7th Cir. 1995).

First, we consider the prosecution's comment on the weight of the evidence to be less damaging than other forms of impermissible argument. Typically, in vouching situations, the prosecution has attempted to bolster a witness's credibility by introducing facts that were not in evidence. *See Cheska*, 202 F.3d at 950-52 (holding that a prosecutor's comment that a witness's cooperation had "convicted 23 other people" impermissibly bolstered witness's credibility through evidence outside the record); *Johnson-Dix*, 54 F.3d at 1304 (finding improper but harmless the prosecutor's comment that a federal agent would risk his career by committing perjury). Lassar's comment did not serve to bolster anyone's credibility and so did not invade the province of the jury to assess credibility or determine facts. Essentially, the prosecution appealed to the jury's supposed belief that the government only prosecutes strong cases and this was, in Lassar's opinion, one of the strongest. Although improper, this generalized comment cannot be considered nearly as damaging as introducing a fact that bolsters a particular witness's credibility. *Cf. Johnson-Dix*, 54 F.3d at 1304 (holding that prosecutor's remark vouching for credibility of government agent was "certainly improper"). Furthermore, the prosecution made the comment only once, which considering the length of the trial and the closing argument, could not have weighed that heavily in the minds of the jury. *See Alexander*, 163 F.3d at 429 (considering frequency of improper statements as an element of its seriousness).

Defense counsel could not have invited Lassar's comment and could not counter it directly during their own closings, so those two factors weigh in favor of reversal. However, the two remaining factors strongly support the district court's decision. The court instructed the jury before the completion of closing arguments with the following:

> During the course of Mr. Lassar's closing argument he made reference to the strength of the evidence in this case as compared to other cases. Such references to other cases are totally irrelevant. So I would instruct you that you should absolutely disregard any statements or references comparing this case to any other case, and you should decide this case solely on the evidence presented in this case without regard to any comparison to any other case.

We presume juries can and do follow curative instructions. *See United States v. Mazzone*, 782 F.2d 757, 764 (7th Cir.

1986) (presuming jury followed curative instruction given after prosecutor's improper statements in closing). Considering the largely irrelevant implication of Lassar's comparison, we believe a jury could easily follow this instruction.

Finally, the Court has reviewed all of the evidence against Andreas and Wilson and can fairly characterize it as overwhelming. *Cf. United States v. Owens*, 145 F.3d 923, 928 (7th Cir. 1998); *Johnson-Dix*, 54 F.3d at 1305 (holding that weight of the evidence indicates that jury verdict cannot be attributed solely to prosecutor's closing comment that FBI agent would not risk his career through perjury). In *Owens*, 145 F.3d at 928, the prosecutor told the jury that he, the prosecutor, told the witness "if you lie to me, your deal is off." Without deciding whether the comment in isolation was improper, we held that "in light of the overwhelming evidence against" the defendant, the remark did not deprive him of a fair trial. The evidence at trial included the defendant "caught on both audio and video tape" in a drug transaction that officers surveilled. *Id.* at 925. The taping had been accomplished because a man arrested on a drug charge had agreed to cooperate as an undercover informant and wear a wire during the sting operation. Three officers and the informant testified at trial against the defendant. In our view, this amounted to "overwhelming evidence," which combined with a curative instruction, rendered the trial fair despite the improper vouching. *Id.* at 928.

After reviewing the entire record, including several videotapes and audiotapes, we find the evidence against Wilson and Andreas to be much stronger than that proffered in Owens. Lassar's missteps came at the end of a two-month trial in which the jury heard directly from coconspirators, heard the defendants' voices and saw their faces on video making illegal deals. It would challenge credibility to say that a prosecutor's rather nugatory comment assessing the evidence at trial rendered the trial fundamentally unfair.

Therefore, we cannot say that Judge Manning abused her discretion in denying the motion for mistrial.

2. *Fifth Amendment*

During closing, Lassar also discussed the defendants' interviews with the FBI in June 1995 at which they denied any knowledge of price fixing or sales volume allocation agreements. At the time of those interviews, the defendants did not know of the extensive tape-recorded evidence of their conversations detailing both agreements. That evidence severely undercut a "no knowledge" defense, and at trial, the defendants did not deny knowledge. Rather, defense counsel argued that the agreements were pro-competitive or that they were part of a clever deception. These theories were directly inconsistent with the denials Andreas and Wilson offered in June 1995.

Lassar suggested to the jury that they "ask [themselves] why didn't we hear those defenses from Mr. Wilson and Mr. Andreas on June 27, 1995? That was their opportunity if they had a defense. They were confronted. That was their opportunity to give all these defenses." He then implied that defense counsel would fabricate new explanations for their clients' behavior that their clients did not offer a year earlier and that the new explanations were lies. The defense objected on the ground that Lassar's statements punished the defendants for invoking their Fifth Amendment right not to testify. The district court agreed, finding Lassar's closing to be improper under the standard announced in *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996). Judge Manning strongly rebuked the government for this error, but ultimately found the remarks to be harmless. *Cf. id.* at 499-500 (applying harmless error review); *Rodriguez v. Peters*, 63 F.3d at 562 (holding that defendant suffered "no prejudice" from allegedly improper comment on defendant's refusal to testify). She instructed the jury to disregard the improper portions of Lassar's closing and not to penalize the defendants for remaining silent.

The government contends that Lassar referred only to the "lies" that Andreas and Wilson told when questioned by the FBI in June 1995, and in fact he prefaced this section of his argument by saying, "There's one more event to talk about, and that event occurred on June [27],[8] 1995." The district court, however, rejected this explanation. In Judge Manning's view, Lassar's comments were not narrowly confined to an attack on defendants' inconsistent statements, but reached well into their refusal to testify. The right against self-incrimination is violated when (1) the prosecutors manifestly intended to refer to the defendant's silence, or (2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *Rodriguez v. Peters*, 63 F.3d at 561 (citations omitted.) Once we determine that a violation occurred, we apply harmless-error review to decide whether the remark prejudiced the defendant's case. *See id.*

As an initial point, the defense emphasizes the distinction between error that is "harmless" and error that is "harmless beyond a reasonable doubt." The defense believes Judge Manning applied a lower standard of harmless error review to the purported Fifth Amendment violation, and because she found the error to be "just barely" harmless, it follows that under the higher standard, the error could not be harmless. As we acknowledged in *Cotnam*, 88 F.3d at 498 n.11, this Court has not always clearly articulated the different analyses to be applied to prosecutorial misconduct under the Fifth Amendment compared to that applied under a general due process claim. *Rodriguez v. Peters*, for example, seemed to apply both the five-factor due process test to a Fifth Amendment violation, 63 F.3d at 557, as well as the two-part

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[8] Lassar misspoke in closing and used the wrong date.

Fifth Amendment test. 63 F.3d at 561. Ultimately, we found "no prejudice" stemming from the Fifth Amendment error in *Rodriguez v. Peters*, 63 F.3d at 562, a holding that does not reveal whether in that case we considered the appropriate standard to be harmless or harmless beyond a reasonable doubt, since "no prejudice" would be harmless under either standard.

Judge Manning addressed the improper prosecutorial comment claims together, *see United States v. Andreas*, 23 F.Supp.2d 855, 862 (N.D. Ill. 1998), rather than separately. As such, she applied the five-factor test we use for due process challenges to both types of claims. *See id.* While this may not have been technically correct, Judge Manning did apply the highest standard of review—"harmless beyond a reasonable doubt"—to both sets of claims. *See Andreas*, 23 F.Supp.2d at 862 (citing *Cotnam*, 88 F.3d at 498) ("[T]he government bears the burden of proving beyond a reasonable doubt that the defendants would have been convicted absent the unconstitutional remarks."). The district court conflated the tests for the two types of cases, but much more importantly, the court reviewed both the due process and Fifth Amendment challenges under the "harmless beyond a reasonable doubt" standard. If this constituted error, it served only to *over*protect the defendants' rights, not to *under*protect them.[9] As such, we do not find that Judge Manning applied the wrong standard for harmless error and review her denial of a mistrial for abuse of discretion.

As a first step in addressing the Fifth Amendment claim in this case, we do not believe that the government intended to draw attention to Andreas' and Wilson's silence at trial. We credit the government's explanation, bolstered by the context of the remark, that it meant to point out the inconsistency between the statements made by Wilson and Andreas in June 1995 with the defense theories at trial. That leaves open the possibility that a jury would "naturally and necessarily" take the remarks to be a comment on the defendants' silence at trial. While part of the comments innocently referred to the "lies" told in June 1995, the government stepped over the line when it directed the jury to "ask [yourselves] why didn't we hear those defenses from Mr. Wilson and Mr. Andreas on June 27, 1995. That was their opportunity if they had a defense . . . That was their opportunity to give all these defenses." While unintended, these sentences "naturally and necessarily" imply guilt from the defendants' silences; they indicate a requirement that innocent people must supply defenses, and in that way, the remarks violated the Fifth Amendment.

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[9] Similarly, in misstating the two-part test for a Fifth Amendment violation as a conjunctive rather than disjunctive, the district court again overprotected the defendants' rights, which by definition cannot prejudice the defendant.

Once a constitutional violation has been found, "the government can only prevail if it sustains the burden of proving beyond a reasonable doubt that the defendant would have been convicted absent the prosecutor's unconstitutional remarks." *Cotnam*, 88 F.3d at 500 (quoting *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1302 (7th Cir. 1985)). Considering the overwhelming nature of the evidence, we agree with the district court that the error was entirely harmless. *See, e.g., Chapman v. California*, 386 U.S. 18, 22-24 (1967) (holding that trial court must determine whether Fifth Amendment violation was harmless beyond a reasonable doubt); *Cotnam*, 88 F.3d at 499-500; *Rodriguez v. Peters*, 63 F.3d at 562; *United States v. Hubbard*, 61 F.3d 1261, 1269 (7th Cir. 1995); *Williams v. Lane*, 826 F.2d 654, 667 (7th Cir. 1987) (applying harmless beyond a reasonable doubt standard to Fifth Amendment violation); *United States v. Buege*, 578 F.2d 187, 189 (7th Cir. 1978) (same).

To determine the extent of the harm from an improper remark, we must consider the context in which it was offered.

See Hubbard, 61 F.3d at 1268. In *Hubbard*, the government objected to the introduction of a hearsay statement by saying, "That is hearsay . . . Let Hubbard [the defendant] tell us." *Id.* We found that comment to be less damaging than if it were made in a closing argument, but in viewing the context of the remark, we credited the government's explanation that it meant only to refer to the hearsay problem, not to the defendant's refusal to testify. *Id.* Considering the context of the remark, we found it to be harmless.

Here also, the context shows the government sought to point out the inconsistency between the defendants' prior statements and the current defense theories. The remarks immediately followed a discussion of the June 1995 raids and the defendants' voluntary statements at that time. The jury may have drawn no more than that from Lassar's remarks. Judge Manning properly instructed the jury to disregard any inference that the defendants should have testified at trial, and we presume juries follow proper instructions. *See Rodriguez v. Peters*, 63 F.3d at 562. This curative instruction undercuts the potential that the statements caused the jury to convict the defendants.

Finally, the evidence as a whole included statements from co-conspirators and tape-recorded conversations of both Andreas and Wilson that clearly showed they knew of and participated in the conspiracy to fix prices and restrain trade. There simply could be no doubt in the jurors' minds after hearing overwhelming evidence of the defendants' meetings with the cartel that they knowingly violated the Sherman Act. Assuming that the prosecution indirectly—although impermissibly—called to the jury's attention the lack of a defense justification for their actions, these comments amounted to a few brief words in the midst of a two-month trial. To say that these brief comments resulted in the convictions would ignore the far more plausible conclusion that the overwhelming evidence of guilt led to the jury verdict. In that context, we find the error to be harmless.

G. Sentencing

The defendants and the government each appeal one issue related to sentencing. The first, whether "volume of commerce" includes all sales or some subset of all sales affected by the conspiracy, is a question of law, which we review de novo. *See United States v. McClanahan*, 136 F.3d 1146, 1149 (7th Cir. 1998). However, once we determine the correct legal principle, we review deferentially the lower court's findings of fact regarding the volume of commerce affected. *See United States v. Hammick*, 36 F.3d 594, 597-98 (7th Cir. 1994) (holding that factual findings in sentencing context are reviewed for clear error). The second issue is whether the district court correctly denied a sentencing enhancement based on the defendants' leadership roles in the conspiracy, a factual finding which we also review for clear error. *See id.*

1. Volume of Commerce Enhancement

The district court enhanced Andreas' and Wilson's sentences based on a volume of commerce affected by the conspiracy greater than $100 million. *See* U.S. Sentencing Guidelines Manual § 2R1.1(b)(2)(G). After an evidentiary hearing, at which both sides presented evidence and argument regarding the amount of sales affected by the conspiracy, the court accepted the report of the U.S. Probation Office that the volume of commerce amounted to $168 million. The court, relying in part on the Sixth Circuit's opinion in *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995), rejected the defendants' argument that "affected commerce" means only that quantity sold at the targeted price and determined that "affected commerce" includes all sales made within the scope of the conspiracy, which amounted conservatively to $168 million.

Wilson and Andreas contend that "affected commerce" means only sales that reflect a successful price agreement, meaning sales at or above the target price. This is clearly wrong. When construing the Guidelines, we look first to the plain language, and where that is unambiguous we need look no further. This is one of those cases.

Section 2R1.1 directs the court to increase the base offense level by seven if the "volume of commerce attributable to the defendant" was more than $100 million. It then explains that "the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation." U.S.S.G. § 2R1.1. The plain language of this section makes clear that the volume of commerce includes only those sales "affected by the violation," rather than *all sales*. However, "affected" is a very broad term whose breadth does not support the unduly constricted meaning given to it by the defendants, *i.e.*, only those sales made at the price set by the conspirators. In this view, had the price been 70-cents per pound and the conspirators agreed to raise it to $1.05, none of the subsequent sales between $.70 and $1.04 would be affected by the conspiracy. This interpretation is ridiculous. To support this view, the defendants cite a district court case from New York. *See United States v. SKW Metals & Alloys*, 4 F.Supp.2d 166, 172 (W.D.N.Y. 1997). The Second Circuit, agreeing that this argument is plainly wrong, reversed *SKW Metals* after Andreas and Wilson filed their initial briefs. *See United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999) ("*SKW Metals II*"). In their reply, the defendants now argue that, consistent with *SKW Metals II*, no sales were affected by the conspiracy because the conspiracy was entirely, or almost entirely, ineffective.

In *Hayter Oil*, the court held that "affected" meant all sales "during the period of the conspiracy, without regard to whether individual sales were made at the target price." 51

F.3d at 1273. *Hayter Oil* involved a simple conspiracy by gasoline station owners in a Tennessee town to set prices at a certain above-market level. Because of competition from non-conspirators and cheating by conspirators, the price did not always hold at the agreed level, and frequent meetings of the conspirators were required to reestablish the price. The district court sentenced the defendants based on sales only at the agreed level and not on all sales affected by the conspiracy. *See id.* at 1272. The Sixth Circuit reversed and held that the plain language of the Guidelines allowed for a much broader definition of "affected," including "all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy." *Id.* at 1273. That would include sales made above the market price, even though below the target price. Ultimately, the court held that standard may have encompassed all sales of gasoline, assuming that all sales were a penny or more above the market price. To that extent, we would agree with the outcome of *Hayter Oil* to include all sales during the time period of the conspiracy, but would disagree to the extent that it forecloses the possibility that some sales might have been unaffected even though occurring during the conspiracy.

The Sixth Circuit reasoned that a broad definition of affected would encompass "even sales lost due to, in accordance with the normal economic principles of supply and demand, the decreased demand that accompanies higher prices." *Id.* We agree in principle with this focus on sales broadly affected by the changed dynamics of a market influenced by illegal restraints. Economic decisions, such as pricing and production, depend on the interplay of a host of variables, none of which can act "independently" in any meaningful sense of that word. In most cases, an agreement to raise prices necessarily affects demand, which will affect output, and the burden to show that some sales were "unaffected" is a difficult one.

However, like the Second Circuit, we disagree with the *Hayter Oil* holding in so far as it implies that all sales during the time period of the price-fixing conspiracy should be counted for purposes of § 2R1.1 simply because they occurred during the period of the conspiracy. While *Hayter Oil* reflects a possible and not unreasonable reading of the Guidelines, it is not the most natural one. Section 2R1.1 counts "the volume of commerce done by him or his principal in goods or services that were affected by the violation." Recognizing that many companies have multiple product lines that compete in separate markets, this language may simply instruct the court to count only the commerce in the product line that was the subject of the illegal agreement. "Affected" might mean all sales of lysine, which was a product line within the scope of the agreement, but not corn oil, which was not. That reading would permit counting all lysine sales during the time period of the conspiracy and even those sales at or below the market price.

Although a permissible reading, we do not adopt *Hayter Oil* because the purpose of the § 2R1.1 enhancement is to gauge the harm inflicted by the illegal agreement. *See* U.S.S.G. § 2R1.1 background para. 4 ("Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive . . . [but] damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute [for determining the scale of the offense]."). Theoretically, sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense.

In *SKW Metals II*, the Second Circuit agreed with *Hayter Oil* in reversing the trial court's judgment that affected sales meant only sales at or above the target price in a price-fixing conspiracy. *See* 195 F.3d at 90. The court also adopted a broad reading of "affected" in line with the realities of the economic marketplace in which few things are ever truly "unaffected" by other market forces. *See id.* The court reasoned that "[s]ales can be 'affected' by a conspiracy when the conspiracy merely acts upon or influences negotiations, sale prices, the volume of goods sold, or other transactional terms. While a price-fixing conspiracy is operating . . . it is reasonable to conclude that all sales made by defendants during that period are 'affected.'" *Id.* The court refused to adopt the government's categorical position that all sales be counted regardless of whether they were "affected" by the conspiracy. *Id.* at 91-92.

An action may affect commerce in many ways other than achieving a pre-determined price level, and we will not frustrate the goal of this provision by grafting some narrow meaning onto the ordinary use of the word "affected." The Guidelines provision serves to set the punishment based on a measurement of the harm done by the crime, and the drafters chose "volume of commerce" as a proxy for determining that harm. Conspiracies to limit output have broad-ranging effects on all decisions made by the former competitors from the moment of their inception. Decisions to expand production, decrease price, institute promotions or compete for certain customers all are affected by an agreement to limit production. *See SKW Metals II*, 195 F.3d at 90. An agreement to raise prices, similarly, affects the conspirators' decisions related to production and consumers' decisions related to demand. Therefore, the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement, since few if any factors in the world of economics can be held in strict isolation.

Still, it is conceivable that under a price agreement, sales made before new price schedules are issued or new quotes given to potential customers may be wholly unaffected, or that some subsequent sales might be sold at the actual market price. *See, e.g., id.* at 93 (Newman, J., concurring) (positing example of "rare instance" where a supplier may quote a bargain price for his brother-in-law without regard to the agreed price).[10] We agree with the Second Circuit that these odd sales completely unaffected by the conspiracy should not be counted for sentencing purposes. *See id.* at 92.

The burden of proof under the Guidelines requires only that the government establish relevant conduct by a preponderance of the evidence, *see United States v. Kroledge*, 201 F.3d 900, 908-09 (7th Cir. 2000), a standard that supports a rebuttable presumption that all sales during the conspiracy were affected by the illegal agreement. *See SKW Metals II*, 195 F.3d at 93-94. (Newman, J., concurring) (requiring defendant *[sic]* prove that one or more sales were not affected by the conspiracy). Courts frequently require defendants to prove affirmative defenses by a preponderance of the evidence, *see, e.g., United States v. Hunte*, 196 F.3d 687, 693 (7th Cir. 1999) (requiring defendant to prove basis for a downward departure by a preponderance of the evidence); *United States v. Wicks*, 132 F.3d 383, 389 (7th Cir. 1997) (holding that a defendant must prove an affirmative defense at sentencing stage by a preponderance of evidence). Evidence of the "rare circumstance" of a completely unaffected transaction "would be peculiarly within the knowledge of the defendant," *SKW Metals II*, 195 F.3d at 93, and the defendant should bear the burden of proving that rare circumstance by a preponderance of the evidence.

Because horizontal agreements to restrain trade, whether by price or output restrictions, naturally affect all sales during the period that the conspiracy operates, the trial court correctly determined the volume of commerce based on all sales within the scope of the conspiracy. Andreas and Wilson presented evidence at sentencing that certain sales were not affected, and the district court considered that proof. The lysine conspiracy restrained trade by allocating each market participant's output and fixing prices. Together these two methods served to raise the price beginning in the summer of 1992 and lasting for nearly three years. The price fluctuated, and cartel members cheated each other when they could, but the evidence soundly supports a volume of commerce influenced by the conspiracy of at least $168 million. Based on the evidence at trial, the court was entitled to find that the conspiracy was indeed successful at affecting more than $100 million in commerce.

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[10] We acknowledge this example as one of the rare instances when a price fixer would forgo anticompetitive profits, but it also illustrates how rare the occasion when a price fixer able to charge higher prices would act in an economically irrational way and sell below the inflated market price.

2. *Leadership Roles*

The government requested that Andreas' and Wilson's sentences be increased based on their leadership roles in the conspiracy. *See* U.S.S.G. § 3B1.1. The district court denied the enhancement, finding that neither man was more culpable than his co-conspirators. We review for clear error the district court's application of a sentencing enhancement under § 3B1.1. *See United States v. Golden*, 954 F.2d 1413, 1418 (7th Cir. 1992).

Section 3B1.1 enhances a defendant's sentence based on the defendant's role in the offense. An organizer or leader of a criminal activity that "involved five or more participants or was otherwise extensive" receives a four-level increase, while a manager or supervisor earns a three-level increase. *See* U.S.S.G. § 3B1.1(a), (b). Section 3B1.1 requires that the district court find that the "defendant organized or supervised a criminal activity involving four other participants." *United States v. Kamoga*, 177 F.3d 617, 621 (7th Cir. 1999). The district court found that the conspiracy satisfied the size requirements of § 3B1.1, but that Andreas and Wilson did not control the requisite number of participants to merit the increase. *See United States v. Mustread*, 42 F.3d 1097, 1103

(7th Cir. 1994). After reviewing the record, we hold that the district court erred in making this finding of fact.

Evidence submitted at trial and during the sentencing phase indicated that at least three sales executives—Marty Allison, Alfred Jansen and John Ashley—in addition to Andreas, Wilson and Whitacre, helped to implement the pricing and volume allocation schemes. Even discounting Whitacre, who was a government agent during part of the conspiracy and therefore cannot be counted as a participant for that part, *see* U.S.S.G. § 3B1.1 application note 1, the crime still involved the requisite number of participants for an enhancement.

Furthermore, the court should have considered Andreas' control over the foreign co-conspirators at the Irvine meeting as counting toward the minimum number of participants needed for the § 3B1.1 enhancement. A co-conspirator who used his power to guide or direct other conspirators qualifies as an organizer even though his control was not absolute. *See Kamoga*, 177 F.3d at 621. The need to negotiate some details of the conspiracy with the cartel members also does not strip a defendant of the organizer role. *See United States v. Evans*, 92 F.3d 540, 545 (7th Cir. 1996) (recognizing possibility of collective leadership fulfilling § 3B1.1); *United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993).

The district court erred in focusing on the conspiracy as a union of equals, which it was only in part. Neither the Guidelines nor our cases require the "participants" to be mere drones working for their queen. In *Evans*, 92 F.3d at 545, we recognized the "concept of collective leadership," which is the case here. Evidence from the Irvine meeting showed that Andreas used coercive power to force the foreign competitors to accept ADM's leadership role in the cartel, demonstrating his control over the cartel and its participants. When the cartel had internal squabbles and disputes, Andreas was called in to resolve them. ADM's market power gave Andreas the ability to coerce the other cartel members into submission, and the evidence is clear that he used that power to lead the conspiracy. The fact that control over co-conspirators was not absolute and that he had to negotiate does not negate the conclusion that Andreas was the ultimate leader of the price-fixing cabal.

The evidence at trial conclusively showed that Wilson engaged in the conspiracy by running the meetings and speaking for ADM. He appears on countless tapes proposing ways to run the cartel and ways to make it more efficient. His entire purpose in attending lysine meetings as the head of the corn processing division was to bring his management skills to the cartel. Neither he nor Andreas can claim in any meaningful way to be merely equally culpable with the other conspirators since it was ADM that suggested the scheme, planned it and carried it out. Therefore, we find the district court's decision to deny the four- and three-level enhancements for Andreas and Wilson, respectively, to be clearly erroneous.

III. CONCLUSION

For the reasons stated above, the convictions of Andreas and Wilson are AFFIRMED and the cases are REMANDED to the district court for re-sentencing in accordance with this opinion.

A true Copy:

Teste:

/s/ Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL D. ANDREAS; MARK E. WHITACRE;
TERRANCE S. WILSON; and KAZUTOSHI YAMADA
Defendants.

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96 CR 762

MEMORANDUM AND ORDER

[Filed July 13, 1999]

This matter is before the court on the parties' motions regarding the imposition of sentences for defendants Michael D. Andreas, Mark E. Whitacre,[1] and Terrance S. Wilson. A sentencing court "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [s]he may consider, or the source from which it may come . . .

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[1] To date, the court has received no motions or objections from Whitacre or his counsel concerning sentencing other than his motion to waive his physical appearance and to be sentenced via videoconferencing. Whitacre's motion is denied in part since amazingly the state-of-the-art Edgefield Federal Correctional Institute in South Carolina, Whitacre's current penal institution, has no video link with the U.S. Courts. Hence, his sentencing must be performed via telephonic conference call. Whitacre rode on the coat tails of the successful joint motion of Andreas and Wilson with respect to the imposition of the alternative fine provision under 18 U.S.C. § 3571(d). However, absent filing his own motions, such will not be the case for any remaining sentencing issues.

without regard for the rules of evidence." U.S.S.G. § 6A1.3; *United States v. Gerstein*, 104 F.3d 973, 978 (7th Cir. 1997); *see also United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995).

I. Base offense levels proposed in the defendants' presentence investigation reports[2]

In a presentence investigation report (PSI) prepared by the United States Probation Office, applying the 1998 edition of the sentencing guidelines, Andreas has a proposed base offense level of 10 under the U.S.S.G. § 2R1.1 for the one-count violation of the Sherman Antitrust Act, 15 U.S.C. § 1. Under § 2R1.1, the court is allowed to upwardly adjust the offense level based on the amount of "affected commerce"—here, dry domestic lysine. In a prior pretrial ruling, the court adopted the definition of "affected commerce" established in *United States v. Hayter Oil Co.*, 51 F.3d 1265 (6th Cir. 1995), meaning that defendants were per se liable for all domestic dry lysine sales during the conspiracy period which, according to the PSI, was approximately $168 million which easily exceeds the $100 million adjustment level in the table at § 2R1.1(b)(2)(G). Thus, the adjusted sentence based solely on the antitrust offense alone, stands at a level 17.

The PSI also concluded that Andreas deserved a 4-level upward adjustment, pursuant to U.S.S.G. § 3B1.1(a), for his role as a manager, organizer, and leader of the lysine conspiracy. Specifically, the PSI noted that the evidence adduced at trial had shown that co-defendants Wilson and Whitacre had reported to Andreas who, himself, had actively negotiated and represented ADM at several important price and volume allocation meetings, particularly the 1993 Irvine, California meeting. After combining the § 2R1.1(b)(2)(G) & § 3B1.1(a) upward adjustments, the PSI concluded that Andreas' total offense level is 21, placing Andreas in Zone D of the sentencing table with a sentence ranging from 37 to 46 months, but with a statutory maximum, under 15 U.S.C. § 1, of three years (36 months).

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[2] The court pauses to commend the thorough and professional presentence investigation reports prepared by the U.S. Probation Office. This case presented highly complex sentencing issues involving antitrust law never confronted by any court, or its probation officers, in the Northern District of Illinois. The detailed synthesis of the facts and applicable sentencing guidelines provided invaluable assistance to the court and promoted the speedy resolution (when compared to the sheer girth of the case) of this prolonged sentencing phase.

Likewise, Whitacre's PSI recommends an adjusted base offense level of 14. Whitacre, unlike Andreas, cooperated with the government and, as a matter of law, was no longer a member of the conspiracy on and after October 1992, once Whitacre began his cooperation with the government's investigation of the conspiracy. Like Andreas, the PSI recommends no downward adjustment for acceptance of responsibility stating that "[Whitacre] has not demonstrated an affirmative acceptance of responsibility for his criminal activity." Whitacre Presentence Investigation Report at 7. Due to Whitacre's position as manager of ADM's Bio-Products Division, the PSI reasoned that Whitacre deserved an upward adjustment, under § 3B1.1(b) for supervising five or more co-conspirators (ADM salespersons) involved.

Wilson's PSI calculates his base offense level to be 10 upwardly adjusted by 7 levels for the amount of affected commerce. The PSI further reasons that Wilson arguably deserves an upward adjustment, pursuant to § 3B1.1(b), for his role in the conspiracy, namely, establishing a phony trade association to conceal the conspiracy meetings and training his co-conspirators how to manipulate sales volume to regulate the price agreement. Noting Wilson's confidence, demeanor and knowledge demonstrated in surreptitiously recorded videotapes of several conspiracy meetings, the PSI concludes that Wilson was clearly a top organizer and leader of the conspiracy.

II. Relevant Conduct: Citric Acid

During oral argument on his post-trial motions, Andreas argued that it would be fundamentally unfair and offensive to due process to punish him for conduct—participating in a sales volume allocation agreement—which has never been expressly adjudicated an illegal act. The court disagreed since Andreas' claim ignored a critical factual predicate—that the sales volume allocation was used in furtherance of price-fixing agreements that are clearly illegal.

Andreas again rings the due process bell and this time he is absolutely correct. Andreas' asserts that the government, under the cover of U.S.S.G. § 1B1.3, is attempting to unfairly inflate his sentence by tacking on his purported conduct in the alleged citric acid conspiracy as "relevant conduct" to calculate the base offense level for the lysine conviction.[3] Andreas contends that the government is unfairly casting the citric acid conspiracy as "relevant conduct" in order to circumvent another criminal trial and punish him for uncharged and unproven allegations with the aid of a lower burden of proof.

U.S.S.G. § 1B1.3(a)(2) is popular with prosecutors since district courts *must* increase the defendant's base offense level to account for "relevant conduct" which includes "all acts and omissions committed . . . by the defendant," U.S.S.G. § 1B1.3(a)(1)(A), that are "part of . . . a common scheme or plan as the offense of conviction," which needs only to be proven by a preponderance of the evidence—*not* beyond a reasonable doubt. U.S.S.G. § 1B1.3(a)(2); *United States v. Crockett*, 82 F.3d 722, 729 (7th Cir. 1996); *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991).

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[3] The court's analysis applies equally to defendant Wilson.

"Offenses are part of the same course of conduct if they are 'sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *United States v. Patel*, 131 F.3d 1195, 1203 (7th Cir. 1997). Factors to consider in determining whether the purported "relevant conduct" is part of the common scheme include: (1) the degree of similarity between the offenses; (2) the regularity of the offenses; (3) the time interval between the offenses; and (4) whether the charged and uncharged offenses share common victims, accomplices, common purpose, or similar modus operandi. *Taylor*, 72 F.3d at 548; *United States v. Acosta*, 85 F.3d 275, 281 (7th Cir. 1996). These factors are limited by the fact that U.S.S.G. § 1B1.3(a)(2) "must not be read to encompass any offense that is similar in kind to the offense of conviction but that does not bear the required relationship to that offense." *United States v. Bacallao*, 149 F.3d 717, 720 (7th Cir. 1998); *United States v. Beler*, 20 F.3d 1428, 1432 (7th Cir. 1994); *see also Duarte*, 950 F.2d at 1263. The obvious unfairness of this practice has been lamented in numerous Seventh Circuit opinions, but has been held perfectly legal by the Supreme Court. *See United States v. Grayson*, 438 U.S. 41 (1978).

Here, the government asserts that the degree of similarity weighs in their favor since the price-fixing involved in the lysine conspiracy and as alleged with respect to citric acid conspiracy, are antitrust violations involving complex economic and business principles. This argument is frequently raised in drug conspiracy cases where the government moves to enhance a pusher's sentence based on evidence of prior drug purchases made in close temporal proximity to the indicted offense. *See, e.g., United States v. Cedano-Rojas*, 999 F.2d 1175 (7th Cir. 1993) (prior drug quantities included); *Acosta*, 85 F.3d at 281-82 (same); *but see Patel*, 131 F.3d at 1203-05; *Beler*, 20 F.3d at 1432; *Duarte*, 950 F.2d at 1263-64 (no relevant conduct enhancement).

At best, however, the evidence shows that Andreas and Wilson might have learned some tricks from past conduct which they apparently put to use in the lysine conspiracy. Hence, citric acid is an "offense that is similar in kind" but not necessarily part of the common lysine scheme or plan. *Crockett*, 82 F.3d at 730 ("[i]t is not, of course, enough that the conduct in question merely involved drugs"). The record provides precious little details about the precise scope of the alleged citric acid conspiracy. We do know that, with the possible exception of Wilson and Andreas, the government has never linked any of the other lysine conspirators with citric acid. Nor is it likely to do so since, none of the foreign lysine producers are in the citric acid market. There was no communication or interaction between the lysine producers and the alleged citric acid conspirators. Moreover, the two conspiracies involved different markets with different victims, and the lysine conspiracy did not depend on the citric acid conspiracy for its success.

Nothing in the record even remotely suggests that the lysine conspiracy and the alleged citric acid conspiracy—the existence of which remains unproven, uncharged, and unadmitted by both Andreas and Wilson—are part of a single "crime spree." The government asserts that the court can merely conclude that fact based on the unrebutted testimony of ADM executive Barrie Cox. Recall, Cox testified that Andreas and Wilson were involved in an alleged conspiracy to fix the prices of citric acid. Just to be clear, despite the government's assertions to the contrary, the court never conclusively held that the lysine conspiracy was, as a matter of fact, patterned after the citric acid conspiracy. Twice, over vociferous defense objections, the court held that notwithstanding Fed. R. Evid. 404(b), the citric acid evidence was admissible for the very narrow purpose of placing the numerous *lysine* conversations into context and to establish the defendants' knowledge and intent to commit the *lysine* offense. The jury was instructed not to consider the evidence for any other substantive purpose and therefore, the defendants' conviction for the lysine offense has absolutely no factual bearing, as a matter of law, on the existence of the alleged citric acid conspiracy.

That said, the court agrees that the lysine conspiracy and the alleged citric acid conspiracy share only one proven similarity—they are agricultural products. However, as Andreas notes, the alleged citric acid conspiracy involved different victims, corporate conspirators, and geography. The only evidence establishing the participation of Wilson and Andreas or when the citric acid conspiracy transpired is Barrie Cox's testimony. Simply put, the court did not find Cox's uncorroborated testimony, by itself, convincing enough to conclude that Andreas and Wilson were involved in an unindicted, let alone, unproven criminal offense of the magnitude alleged.

It is simply ludicrous to conclude that citric acid is "relevant conduct" for Andreas when the government's star witness on the subject freely admits that he did not know if Andreas was ever even involved in the alleged relevant conduct. As for Wilson, the court is reminded by the Seventh Circuit's stern admonitions that § 1B1.3(a)(2) "should not be applied to [o]ffenses [that are] of the same kind, but not encompassed in the same conduct or plan" as the convicted offenses." *Beler*, 20 F.3d at 1432. Again, with the possible exception of Wilson and Andreas, none of the lysine conspirators were involved in the alleged citric acid conspiracy. The evidence elicited at trial against Wilson and Andreas was not admitted as substantive evidence of their involvement in the citric acid conspiracy. Apart from Cox's uncorroborated testimony the court has no other reliable evidence that shows, by a preponderance of the evidence, that either Wilson or Andreas was involved with the alleged citric acid conspiracy. Absent other corroboration, such as audio and videotapes showing that this alleged conspiracy existed, the court will not assume that one exists (or ever existed) based on the government's promise. Accordingly, the alleged citric acid conspiracy is excluded as relevant conduct for the purposes of calculating the base offense level of any of the defendants. Accordingly, the court will exclude all references and evidence of citric acid from the base offense levels of all the defendants.

To avoid injecting any confusion into the inevitable appeal in this action, the court admits that there is seeming inconsistency to say that Cox's testimony is admissible to prove the existence of the lysine conspiracy, but then disregard it for purposes of aggregating the defendants' sentences. However, as Judge Rovner very recently noted in *United States v. Ruiz*, 178 F.3d 877, 1999 WL 305062 (7th Cir. May 17, 1999):

> While the terminology is similar to that used in Rule 404(b) evaluations, the focus is different. Under Rule 404(b), the question is whether the conduct is close enough in time and similar enough in nature to be relevant to *a determination of intent, knowledge*, etc. In contrast, the issue under sec. 1B1.3 is whether the conduct is close enough in time and character to constitute a single course of conduct or common scheme. . . . conduct which satisfies the Rule 404(b) test may nevertheless not constitute relevant conduct for sentencing purposes. (emphasis added).

At times evidence that is admissible despite 404(b) limitations nevertheless is irrelevant for purposes of U.S.S.G. 1B1.3(a)(2) because the conduct was not, in sum and substance, part of the same common scheme or plan for which the defendants were convicted. *Patel*, 131 F.3d at 1203-04. For the longest time, the Department of Justice's Antitrust Division has convened at least one grand jury in California to investigate an alleged citric acid conspiracy. According to representations by the government and the testimony of ADM executive Barrie Cox, defendant Wilson is likely a primary focus of the citric acid investigation. But the court respectfully reminds the government that Cox's testimony regarding citric acid was, over repeated defense objections based on Fed. R. Evid. 404(b), admitted for the limited purpose of: (1) placing the co-conspirators' recorded conversations and testimony in context; and (2) proving the defendants possessed the requisite intent to form the price-fixing agreement. That is what the government did and the court is not going to allow the government to do an end run around another trial by aggregating the sentences of Andreas and Wilson for a separate uncharged and unproven offense where there is absolutely no reliable evidence that the citric acid offense was directly part of the lysine scheme. As the record stands, the alleged citric acid conspiracy is merely similar in character, but not part of the same criminal scheme and will not be deemed relevant conduct attributable to the defendants' base offense levels.

III. Scope of the Conspiracy

Since the fine calculation for U.S.S.G. § 2R1.1 depends on the amount of "affected commerce" during the life of the conspiracy, the government has tendered numerous documentary and testimonial evidence which it believes establishes that the lysine conspiracy began on June 23, 1992 at the Mexico City meeting and ended on June 27, 1995 when the FBI raided the corporate headquarters of ADM and its co-conspirators. Andreas, relying on *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *United States v. Swiss Valley Farms Co.*, 912 F.Supp. 401, 403 (C.D.Ill.1995), disputes the government's estimate, arguing that the evidence that lysine sold by ADM below the "agreement price" indicates that Andreas withdrew from the conspiracy.

After thoroughly reviewing the government's charts that capture the major highlights of the evidence elicited at trial regarding the dates, locations, and objectives of the conspiracy meetings, the court agrees that for the purposes of sentencing, the lysine conspiracy existed from June 23, 1992 until June 27, 1995 – the day of the FBI raid.

In *United States Gypsum*, the Supreme Court held that participants in an antitrust conspiracy can withdraw or abandon the conspiracy by committing "[affirmative acts inconsistent with the object of the conspiracy and communicat[ing those acts] in a manner reasonably calculated to reach co-conspirators" 438 U.S. at 464-65. Andreas, while still denying his participation in the lysine conspiracy, argues that the evidence of prices below the alleged "agreement price" is inconsistent with the goals of the conspiracy and thus, he should be deemed to have abandoned the conspiracy. That argument is flawed, however, since *United States Gypsum* clearly indicates that the inconsistent act must be communicated to the co-conspirators. Andreas offers a plethora of documentary evidence in the form of business records belonging to the foreign lysine producers expressing concerns that ADM was selling below the "agreement price." Remarkably absent, however, was any communique or correspondence from Andreas to the foreign lysine producers informing them that Andreas was leaving the conspiracy. Absent evidence of clearly demonstrated intent, there is no reliable method of knowing whether ADM's lower prices were not simply a fluke or due to ADM's desire to cheat its co-conspirators. Neither of which constitute withdrawal from the conspiracy.

Having failed to present any persuasive evidence that the defendants intended to withdraw from the lysine conspiracy or to dispute the government's time frame, the court concludes that the lysine conspiracy lasted from June 23, 1992 through June 27, 1995. Hence, the court will impose a fine under U.S.S.G. § 2R1.1 based on ADM's domestic dry lysine sales for that period which, according to undisputed government calculations is $193,297,847.61. Since the level of "affected commerce" attributable to Andreas and Wilson exceeds $100,000,000.00, they both will receive adjusted base offense levels of 17. U.S.S.G. § 2R1.1(b)(2)(G).

The record shows that on November 4, 1992, defendant Whitacre withdrew from the conspiracy by informing the authorities of the lysine conspiracy and assisting them with the covert investigation that ensued. Hence, Whitacre is liable only for lysine sales occurring between June 23, 1992 and November 4, 1992 which, again according to undisputed government calculations, is $18,738,188.65. Because that amount exceeds $15,000,000, Whitacre receives an adjusted base offense level of 15. U.S.S.G. § 2R1.1(b)(2)(E). For the reasons set forth in the relevant conduct discussion, the court will not consider the alleged citric acid conspiracy to calculate the base offense level.

IV. Offense Level Adjustments

A. Andreas

Unsurprisingly, Andreas objects to portions of the PSI and alternatively seeks a reduction in his sentence based on, *inter alia*, his limited role in the conspiracy, and the government's alleged aggressive encouragement to cause him to participate in the lysine conspiracy (which Andreas still contends never existed).

1. Downward departure under *Koon v. United States*

The court first turns to Andreas' motion for a downward departure based on *Koon v. United States*, 518 U.S. 81 (1996) since its factual bases overlap significantly with Andreas' other arguments in favor of departure or in opposition to the government's motions for upward adjustment. The Guidelines create sentencing "heartlands"—the "set of typical cases embodying the conduct that the [relevant guideline provision] describes." *United States v. Santoyo*, 146 F.3d 519, 525 (7th Cir. 1998), citing U.S.S.G. Ch. 1, Pt. A(4)(b), intro. comment.

The parties agree that the relevant guideline is the antitrust provision of U.S.S.G. § 2R1.1.

The *Koon* Court held that district courts can depart from the relevant guideline provision "if there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 518 U.S. at 92, citing 18 U.S.C. § 3553(b). Rather than leave district courts to their own devices, the Sentencing Commission narrowed the circumstances for departure by established categories of factors—forbidden, encouraged, discouraged, and unmentioned—to determine whether a departure is warranted. *Koon*, 518 U.S. at 94-95; *United States v. Meza*, 127 F.3d 545, 548 (7th Cir. 1996).

In the Seventh Circuit, courts apply a three-part test to determine whether to grant motions to downward departure for unmentioned or, as Andreas describes them, "extraordinary circumstances," including whether: (1) an aspect of the case potentially removes it from the prescribed sentencing range; (2) the Commission has proscribed any consideration of the factor as a categorical matter; and (3) "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Meza*, 127 F.3d at 549; 18 U.S.C. § 3553(b).

Attempting to find salvation in the arguably vague (but not very) dicta of *Koon* and its progeny, Andreas asserts that his case is so unusual that it falls outside the heartland of typical antitrust violations governed by U.S.S.G. § 2R1.1. Basically Andreas launches into his familiar diatribe which, after almost three years, the court now affectionately calls the "let's blame Whitacre defense." That is, his conviction falls outside § 2R1.1's heartland because: (1) the government unfairly targeted Andreas for prosecution; (2) that Whitacre "aggressively encouraged" him into conspiring with Messrs. Yamada, Ikeda, Crouy, Wilson, Mimoto, Yamamoto, Kim, Chaudret, and Whitacre himself, to get their companies to intentionally inflate the global price of lysine; (3) the government manipulated his sentence by intentionally prolonging the ADM investigation by not prosecuting him sooner, and giving co- conspirators immunity and lenient plea agreements creating sentencing disparities; and (4) continued market competition, despite the conspiracy's existence, made the conspiracy less harmful than the typical antitrust violations § 2R1.1 contemplates.

Andreas' theory is supported, in part, by renewed attacks over how the FBI gave Whitacre unfettered discretion to tape conversations which were arguably selectively taped or destroyed in order to distort the evidence and "frame" Andreas and co-defendant Wilson for price-fixing. *See generally United States v. Andreas*, 39 F.Supp.2d 1048 (N.D. Ill. 1998). Andreas still proclaims his innocence and denies ever joining a conspiracy which, he contends, is evident from ADM's competitive acts during the scope of the conspiracy period. Finally, Andreas contends that the disparity between his prospective sentence and those received by his foreign lysine co-conspirators is, as a matter of law, grounds for a downward departure.

In response, the government argues that Andreas' claim lacks any merit as is evident from surreptitious videotapes showing that Andreas was predisposed to participate in the conspiracy and freely engaged in the conspiracy without the encouragement of Whitacre or any other government agent. The government, citing numerous Seventh Circuit authority, demonstrates that Andreas' aggressive encouragement and disparate sentencing arguments are not permissible grounds to downwardly depart.

a. Unfair targeting and aggressive encouragement

Andreas invokes the theory of "aggressive encouragement" recognized in *United States v. McClelland*, 72 F.3d 717, 725 (9th Cir. 1995), where aggressive encouragement of wrongdoing "may be used as a basis for departure under § 5K2.12" where, unlike here, "defendants who are predisposed but who are then pressured unduly by the government to go forward with the offense." 72 F.3d at 725. Aggressive encouragement is a not-so distant cousin to the entrapment defense which Andreas never raised at trial and, based on the evidence adduced at trial, was not a viable theory of defense for which the court would have given a jury instruction.

Andreas' aggressive encouragement claim, however, is fueled largely by rank speculation that Whitacre somehow coaxed, cajoled, or encouraged Andreas's participation. As the government notes, the Seventh Circuit has never adopted the Ninth Circuit's aggressive encouragement theory nor, based on the Seventh Circuit's rejection of government misconduct claims as affirmative defenses, *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995), does the court think aggressive encouragement claims will be warmly welcomed.

Even in the unlikely event that the Seventh Circuit was to adopt *McClelland*, Andreas has not met *McClelland*'s burden of proving that Whitacre "unduly pressured" Andreas. The court said it before in its December 30, 1998 order and will say it again—the videotape conversation of the 1993 Irvine, California, coupled with all of the other admitted evidence, dispels any doubt that Andreas did not willingly participate in the conspiracy. Andreas had the opportunity to convince the jury that his Irvine meeting with Ikeda and Yamada was innocent, but the jury did not believe that explanation nor does the court now.

Whitacre never pressured Andreas. Nor can Andreas convince this court otherwise by proffering snippets of purported exculpatory conversations where Whitacre allegedly manipulated Andreas. With all due respect, the video and audiotapes clearly show that Andreas is not easily intimidated by business competitors, let alone an ADM underling of Whitacre's caliber. In other words, this court remains steadfastly convinced that when Andreas decides to do something, *Andreas* does so freely and willingly and not as the result of coercion or encouragement—aggressive or otherwise. Indeed, the court strongly doubts that Andreas would have been such a successful business person (prior to his poor judgment in this one instance) unless he was the strong-willed individual that he is. Accordingly, Andreas' aggressive encouragement claim is rejected as a basis for a downward departure.

b. Sentencing disparities and sentencing manipulation

Andreas' sentencing manipulation claim fails for two reasons. First, "there is no defense of sentencing manipulation [in the Seventh Circuit]." *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996). Second, assuming *arguendo* that the government had insufficient evidence (which it did not), then the government would have had to extend the covert phase of the lysine investigation even longer thereby prolonging the life of the conspiracy and increasing the ultimate penalties. Andreas cannot have it both ways.

Motions for downward departure due to disparate sentences between co- conspirators fair no better. A disparity in sentences between co-conspirators is not a per se basis for granting a downward departure as an "unmentioned category" under *Koon*. In *United States v. Meza*, 127 F.3d 545, 549-50 (7th Cir. 1996) the Seventh Circuit held that downward departures based on disparity in sentences between co-conspirators are available where the disparity is "unjustified" and results from an improper application of the relevant guideline provisions.

Andreas claims that an unjustified disparity exists merely because his coconspirators received plea agreements and immunity to avoid prosecution—despite their comparable culpability—but that he received no deals. Yet, *Meza* rejected the very same argument, noting that U.S.S.G. § 6B1.2 expressly allows coconspirators to receive different sentences where, as here, certain members execute plea agreements under Fed. R. Crim. P. 11(e)(1) and aid the government in prosecuting the other conspirators. *Meza*, 127 F.3d at 549; *see also United States v. McClinton*, 135 F.3d 1178, 1192 (7th Cir. 1998); *United States v. Miranda*, No. 94 CR 714-2, 1998 WL 173300 (N.D. Ill. Apr. 10, 1998) (Williams, J.). This case is no different. Almost all of the foreign lysine producers received immunity in exchange for their cooperation in prosecuting the defendants.[4] This outcome might offend the layperson's sense of justice, but the result is perfectly legal, hardly extraordinary, and clearly not grounds for a downward departure.

c. Limited success of the conspiracy

Andreas essentially renews his motion that global price-fixing and sales volume allocation agreements are not per se illegal. For the reasons previously stated in the December 30, 1998 order, the court declines further comment. Alternatively, relying on *United States v. Stockheimer*, 157 F.3d 1082, 1091 (7th Cir. 1998), Andreas asserts, without any detailed explanation, that the preliminary numerical dollar value of the amount "affected commerce" for purposes of § 2R1.1 grossly exaggerates the seriousness of the crime. The court disagrees. To be clear, Andreas does not dispute the accuracy of the dollar amount to the extent that it was used to upwardly adjust his base offense level under § 2R1.1's by seven levels. *See* § 2R1.1 (b)(2)(G).

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[4] It will be interesting to observe whether the government will revoke some of those cooperation agreements in light of some of the foreign co-conspirators' unwillingness to produce documentation necessary to calculate the alternative fine provision under 18 U.S.C. § 3571(d).

Andreas does not explain what particular aspects of this case take it out of the heartland for antitrust offenses nor does the court see any. As the government argued, this case is no different from the typical antitrust offense, *i.e.*, several large corporations agreed to inflate prices to make some extra cash to feed their own greed. The fact that the participants might have cheated or stabbed one another in the back adds nothing to the analysis since the vast majority of criminal conspiracies—violent, nonviolent, blue-collar or white-collar—involve informants who cooperate and turn in their former compatriots for immunity. That is life in the criminal fast lane. Hence, this argument is likewise rejected. Having found no basis to consider this case outside the § 2R1.1's heartland, Andreas' motion for downward departure under *Koon* is denied.

2. Andreas' role in the offense

Andreas contends that, pursuant to U.S.S.G. § 3B1.2, he is entitled to a four level reduction in his offense level because he is "substantially less culpable than the average participant." In contrast, the government moves for a four-point increase in Andreas' offense level under U.S.S.G. § 3B1.1(a), arguing that Andreas was "[a]n organizer or leader of the [lysine conspiracy] that involved five or more participants or was otherwise extensive." Govt. Sentencing Memo. at 59.

a. Andreas' § 3B1.2 motion for a four-point downward departure

Where a defendant requests a decrease in his offense level, he has the burden of proving by a preponderance of the evidence that he is "substantially less culpable than the average participant in order to warrant a reduction under [U.S.S.G.] § 3B1.2." *United States v. McClinton*, 135 F.3d

1178, 1190 (7th Cir. 1998). Andreas contends that he was a "minimal participant" because Whitacre never told him that the foreign lysine producers wanted to engage in price-fixing and Andreas contends that ADM did not make deals. The court would, for once and for all, like to place Andreas' "we don't make deals" comment into its full context. The court concedes that Andreas told Wilson and Whitacre that ADM does not "make deals." Ironically, Andreas was later captured on videotape at the Irvine meeting with Ikeda and Yamada carving up the global lysine volume in order to stabilize the price agreement. It seems Andreas said one thing and did something completely different. Andreas' sufficiency of the evidence claims have been addressed more than once and any further argument can be made before the court of appeals.

Nothing in the record even remotely suggests that Andreas was less culpable than his co-conspirators, let alone, substantially. He negotiated the sales volume allocation with Ikeda and Yamada which, by all accounts, was absolutely necessary to further the price agreement and further the objectives of the conspiracy. Accordingly, Andreas' motion for a four-point reduction is denied.

2. Enhancement for Andreas' organizer/leadership role

In order for U.S.S.G. § 3B1.1(a) to apply, the court must find that the defendant: (1) managed or organized a conspiracy that involved five participants or was otherwise extensive; and (2) was substantially more culpable vis-a-vis his co-conspirators in which he must have had some real and direct influence, aimed at furthering the criminal activity. *McClinton*, 135 F.3d at 1190 (7th Cir. 1998); *United States v. Fones*, 51 F.3d 663, 668 (7th Cir. 1995); *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994); *United States v. Brown*, 944 F.2d 1377, 1381-82 (7th Cir. 1991). The primary inquiry is relative responsibility—those who play an aggravating role in the offense are to receive sentences that reflect their greater contributions to the illegal scheme as determined by the defendant's relative culpability vis-a-vis other participants in the offense. *United States v. Tetzlaff*, 896 F.2d 1071, 1074-74 n.4 (7th Cir. 1990).

Besides claiming his innocence, Andreas objects to the four-level enhancement arguing that he never managed or otherwise supervised five co-conspirators. Andreas concedes that the court can count Andreas himself to satisfy the five person requirement, but notes that even then, arguably only three people were managed—Andreas and Wilson and Whitacre. Andreas contends that Whitacre cannot be counted, as a matter of law, since he was a government agent at the time of the conspiracy. The government, however, argues that Whitacre was not a government agent prior to November 4, 1992, thus he is eligible based on his acts prior to that time. Even if the government were given the benefit of the doubt and Andreas, Whitacre, and Wilson are counted, the government is still two people shy of a four-point enhancement. The void could be filled if, as the government proposes, ADM sales executives are counted too. That proposal does not work since a participant is "a person who is criminally responsible for the commission of the offense," U.S.S.G. § 3B1.1, and the record clearly reveals that none of the ADM sales executive knew, let alone, participated in the conspiracy. One of the government's star witnesses, ADM executive Barrie Cox, said so at trial and the government admitted it during its closing arguments.

Tacitly conceding that the numbers are not in its favor, the government seeks to circumvent the five person requirement by arguing that, due to its size and scope, the lysine conspiracy was "otherwise extensive" and can be deemed the functional equivalent of a "five person" enterprise led by Andreas for which an enhancement is viable. It is true, § 3B1.1 permits a four-point enhancement where the offense is "otherwise extensive" which the Seventh Circuit defines to include circumstances where the relevant "activity is the functional equivalent of an activity involving five or more participants." *United States v. Tai*, 41 F.3d 1170, 1173 (7th Cir. 1994).

While the *Tai* Court remanded the case for re-sentencing because the district court enhanced the defendants' based on the involvement of three participants and two (innocent) outsiders, the Seventh Circuit expanded § 3B1.1's scope to include "the unknowing services of many outsiders." *United States v. Mohammad*, 53 F.3d 1426, 1437 (7th Cir. 1995). Hence, the government correctly argues that the court may consider how Andreas and his co-conspirators utilized the aid of unwitting corporate underlings to further the price-fixing scheme. The sheer girth of the lysine conspiracy permits the court to deem it the functional equivalent of a five-person criminal enterprise. The only problem is convincing the court that Andreas' conduct vis-a-vis his foreign competitors was greater to make him the "brains" of the outfit. *See McClinton*, 135 F.3d at 1191.

The primary purpose of § 3B1.1 is to punish—choose a euphemism—the "chief," "kingpin," "brains," "mastermind." In order to determine whether the defendant was an "organizer" or "leader," the court must consider: (1) the defendant's exercise of decision making authority; (2) the nature of the defendant's participation in the commission of the offense; (3) the degree of the defendant's participation in planning or organizing the offense; (4) if the defendant claimed a right to a larger share of the fruits of the crime (5) the nature and scope of the illegal activity; and (6) the degree of control and authority exercised over others. *United States v. Parmelee*, 42 F.3d 387, 399-400 (7th Cir. 1994).

Applying those factors to the record, nothing convinces the court that Andreas, was a kingpin or supervisor any greater than other corporate executives involved in the lysine conspiracy. When compared with Ikeda, Yamada, Crouy, Chaudret, and Yamamoto, Andreas and Wilson were equals. The only thing that makes them worse than their counterparts was their inability to cut a deal with the government to avoid prosecution. A deal, by the way, which was never on the table for Andreas or Wilson. In that limited respect, the court agrees that Andreas and Wilson never made any deals.

The government implies that Andreas was the worst of the bunch because he threatened to flood the market in order to coerce cooperation from the other producers. That is certainly one interpretation of the evidence. Another equally plausible explanation is that the heads of several international corporations met secretly in hotel rooms under the guise of a sham trade association to talk price-fixing and later came to an agreement. They all had authority over their own underlings and exerted their own autonomy. If as the government contends, Andreas was the "big boss," he could have avoided the Irvine Meeting to stabilize the volume allocation by directly calling someone at Ajinomoto, Sewon, Eurolysine, and so forth, and simply ordered them to sell a specific volume at the set "agreement price." That is not what happened. Andreas had to negotiate with Ikeda and Yamada and they all had to agree or the deal was off. That is hardly what the court would call a "big boss." Equally probative is the fact that the record clearly indicated that the foreign producers have engaged in illegal conduct long before Andreas or Wilson entered the lysine market. Hence, the court does not believe Andreas and Wilson could coerce Ajinomoto and the rest as powerfully as the government claims.

Here, the whole team wanted to play coach and quarterback which inevitably led to cheating amongst the conspirators. The alleged cheating which occurred was under the auspices of Ikeda, Yamada, and others who apparently did not care too much for what Andreas or Wilson had to say until the group collectively realized that the conspiracy would fail without mutual cooperation that could not exist unless all of the "kingpins" (yes, plural) agreed. Hence, the first three *Parmelee* factors are inconclusive as to Andreas.

While Andreas enjoyed a large share of the lysine profits by virtue of his status as a major ADM shareholder, there is no evidence that it was substantially greater than that enjoyed by the Koreans, Japanese, French, or Swiss. Accordingly, the fourth *Parmelee* factor is equally unpersuasive. Finally, as noted above, the lysine conspiracy was large. But its size was the result of several corporate leaders joining together to break the law. Andreas bears no greater culpability than his contemporaries and thus, does not deserve a four-point enhancement. As such, the government's motion for a four-point enhancement under U.S.S.G. § 3B1.1 is denied.

B. Wilson

1. Role in the offense

The government, pursuant to U.S.S.G. § 3B1.1(b), moves for an upward enhancement of Wilson's sentence, claiming that Wilson used his price-fixing expertise to become the de facto "coach" of the lysine conspiracy thereby deserving an enhancement due to his function as a manager/supervisor of the conspiracy. Like Andreas, the record does not establish any convincing evidence that Wilson supervised or managed any of his lysine co-conspirators.

While the numerous audio and videotapes show him taking a prominent role in the discussions to regulate the objectives of the conspiracy, his role did not appear to be any greater than that of the other foreign lysine competitors or otherwise influenced or controlled their participation in the lysine conspiracy. Rather, the court agrees with Wilson's description of his participation—he was a "coequal" with his co-conspirators—no more or less culpable than the rest of his co-conspirators. Accordingly, the government's motion for an upward enhancement of Wilson's sentence under § 3B1.1(b) is denied.

2. Downward departure for exceptional family circumstances, age, and health

Wilson asks the court to reduce his sentence under U.S.S.G. § 5H1.6, due to "exceptional family circumstances." Before addressing the merits of the motion, the court acknowledges Wilson's standing objection to the public disclosure of his family and medical history. Nonetheless, as previously addressed by the court, there is a strong presumption in favor of public access to court proceedings. *See generally United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982). "This presumption is rebuttable upon demonstration that suppression 'is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). While the court can appreciate Wilson's desire not to subject his family to further public scrutiny, the fact remains that he opened the door to his family's private life the moment he invoked his family as a basis for a departure.

a. Extraordinary family circumstances

The district court may depart from an applicable guidelines range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994). Wilson asserts that incarceration will cause an irreparable harm on his family, particularly his son, Robert Wilson. The court is incredibly sympathetic to the plight that this entire process has imposed on the Wilson family, especially Mrs. Mary Jo Wilson and her son Robert. Nevertheless, after careful consideration of all of the materials submitted on this issue, the court must deny the motion. The potential effect of Mr. Wilson's family is no greater than that of the typical criminal case to warrant a downward departure and doing so here would deprecate the gravity of the offense. It is unfortunate, but the simple truth is that incarceration will always adversely impact a defendant's family—economically, emotionally, and sometimes physically.

The court agrees that sentences which are not tempered by some degree of compassion for the defendants' family can cause a substantial hardship. At the same time, that hardship must be balanced with the court's fundamental obligation to never implicitly or explicitly disregard the severity of the crime. That is an especially serious concern with "white-collar" offenses in which there is a popular but absolutely erroneous perception that the violation is minor. As the Seventh Circuit so eloquently noted:

> [W]e take this opportunity to emphasize to the district judges of this circuit that no "middle class" sentencing discounts are authorized. *Business criminals* are not to be treated more leniently than members of the "criminal class" just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity ... [i]t is natural for judges, drawn as they (as we) are from the middle or upper-middle class, to sympathize with criminals drawn from the same class. But in this instance we must fight our nature. Criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime. (emphasis added).

United States v. Stefonek, 179 F.3d 1030, 1999 WL 356407 at *7 (7th Cir. Jun. 3, 1999) (Posner, J.).

Judge Posner's accurate description of the need to avoid double standards for white-collar offenders did not arise in the context of downward departures for family circumstances. Nonetheless, in the past this court has reluctantly but steadfastly refused downward departures in cases far more exceptional than Wilson's. While the court sympathizes with the plight of the Wilson family, the simple truth is that in the long run they will fair far better than the typical criminal defendant that appears before this court. Accordingly, the motion for downward departure based on exceptional family circumstances is denied.

b. Poor Health

Alternatively, Wilson seeks a downward departure claiming that incarceration will complicate his preexisting heart condition making any incarceration a de facto death sentence. Wilson and the government presented expert testimony and affidavits so divergent as to suggest that the opinions were too biased to make a reliable decision regarding the sentence. As such, the court appointed an independent cardiologist, Dr. Allen S. Anderson, Medical Director of the Heart Failure and Transplant Program at the University of Chicago.

Dr. Anderson's expert report presented a fair and balanced review of Mr. Wilson's health while implicitly addressing the relative strengths and weaknesses of the parties' conflicting opinions. In sum, Dr. Anderson acknowledges that Mr. Wilson does suffer from very serious, but manageable, cardiac problems. Fairly read, Dr. Anderson's report concludes that Wilson is at low risk of suffering from a sudden and lethal heart attack and that, with proper medical monitoring, incarceration poses no greater health risk than managing a Fortune 500 company. Accordingly, Wilson's motion for a downward departure based on his health is denied. The court will make a non-binding recommendation to the Bureau of Prisons to assign Wilson to a BOP medical facility.

c. Acceptance of responsibility

Following the old adage "you never know unless you ask" Wilson astonishingly moves, pursuant to U.S.S.G. § 3E1.1, for a downward departure for accepting responsibility in the lysine conspiracy. The Sentencing Guidelines provide for a two-point decrease in offense level "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The commentary to § 3E1.1 provides that a downward adjustment "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Application Note 2; *see also United States v. Morgano*, 39 F.3d 1358, 1377-78 (7th Cir. 1994). Citing *United States v. McKittrick*, 142 F.3d 1170, 1178 (9th Cir. 1998), Wilson contends that notwithstanding putting the government, not to mention this court, through the burden of an eleven-week trial, he is entitled to a two-point reduction because he was preserving his right to challenge the applicability of the Sherman Antitrust Act to his alleged conduct.

Wilson, however, does not claim that the Sherman Act is legally inapplicable to his price-fixing misconduct. Instead, he merely asserts that, as a matter of fact, none of his conduct was indicative of Wilson's intent to form the illegal agreement even though the jury did not believe him. This is exactly the type of question that "relate[s] to factual guilt" for which *McKittrick* does not recognize as grounds for a downward departure under § 3E1.1. Wilson rolled that dice at trial and lost.

The Seventh Circuit precedent on this issue is clear—no two-point downward departures for defendants who deny the charge, go to trial and eventually lose. Any other result is "contrary to the basic system of incentives and disincentives established by the acceptance of responsibility reduction, namely to reward those who plead guilty—saving the judiciary and government from the time, expense and effort of a trial." *United States v. Gomez*, 24 F.3d 924, 926 (7th Cir. 1994). Even now, as he asks for a downward departure for acceptance of responsibility, Wilson still insists that he never committed the crime. Granting this motion would undermine the very purpose of § 3E1.1 and thus, is denied. The court noticed that defendant Andreas implied that he would likewise seek this departure, but failed to formally move for one. The government's response indicates that Andreas might have decided not to seek it. But just in case the motion was somehow lost in the plethora of sentencing memoranda and motions, that motion would also be denied as to Andreas for the exact same reason.

V. Sentences

1. Andreas and Wilson

Having denied all motions for enhancement and downward departure of sentences as to Andreas and Wilson, and excluded citric acid as relevant conduct for purposes of calculating the base offense level, the court finds that both Andreas and Wilson have a total adjusted offense level of 17, and (having no prior convictions) a criminal history category of I, which places them in Zone D of the Sentencing Table with a range of 24 to 30 months. **The court, in its discretion, sentences Michael D. Andreas and Terrance S. Wilson to 24 months of incarceration to be served at a facility to be determined by the BOP.** However, as previously noted, the court recommends that Wilson serve his sentence at a BOP medical facility.

Because the volume of affected commerce attributable to defendant Andreas' and Wilson's conduct easily exceeds the statutory maximum of 15 U.S.C. § 1, pursuant to U.S.S.G. § 2R1.1(c)(1), **Michael D. Andreas and Terrance S. Wilson shall be fined $350,000.00.**

2. Whitacre

Before the imposing sentence, the court finds it incredibly important to note for the record that Whitacre's counsel diligently represented the best interests of his client and was often forced to make difficult strategic decisions as to how to best represent Whitacre. During the sentencing phase, neither Whitacre nor his counsel have filed a single motion or raised a single objection to the government's version of the offense contained in the PSI or the PSI's sentencing recommendations, especially the request for an enhancement of sentence as a manager of the conspiracy. Given Whitacre's prior criminal history and failure to object, it seems that the government's cooperating witness will actually receive more time than defendants Andreas and Wilson. Again, sentencing disparity is perfectly appropriate where, as here, the sentence is the result of a proper application of the relevant guideline provisions. The court declines to speculate what might have motivated Whitacre to not object to the PSI and will hold him to his waiver of argument in opposition to the enhancement.

The court previously allowed Whitacre to ride on the coattails of Andreas and Wilson and gave him the benefit of favorable rulings that arguably should apply to all three defendants. That practice stops immediately! At the sentencing hearing, Whitacre and his counsel informed the court that they both read and understood the PSI and sought no corrections or recalculations. If they knowingly and voluntarily consent to the government's proposal to enhance his sentence, then this court will not stand in his way.

After thoroughly reviewing the PSI and considering all of Mark Whitacre's actions before, during, and after the government's investigation of the lysine conspiracy, the court finds that he does not deserve any reduction in sentence for his acceptance of responsibility nor for assisting the government. Whitacre complained that he has received no form of aid from the government since being indicted before this court. Well, quite frankly, he should never have expected any after trying to play both sides of the fence. Recall, Whitacre lied to everyone about his embezzlement of ADM funds and attempts to extort money from the biotechnology espionage affair commonly referred to as the "Fujiwara Incident." And who could possibly forget about Whitacre's attempts to derail the entire lysine prosecution and save his own neck by claiming that he destroyed exculpatory evidence and/or hid it by sending it to his associate David Hoech.

Needless to say, this court is not persuaded that Whitacre deserves any reduction in sentence for his "aid." Whitacre is the major exception to the basic rule that cooperating witnesses deserve lesser sentences. Time and time again, the government must often rely on the aid of crooks and snitches to convict the guilty. But for the testimony of the other co-conspirators and the videotapes which captured Andreas and Wilson in the act, the court is thoroughly convinced that the jury would have acquitted the defendants. Whitacre helped nobody but himself and prolonged this case to the detriment of the government and this court and now suffers a fate created by his own misguided greed, deceit, and outright theft!

In light of Whitacre's lack of objections to the PSI, the court adopts the PSI in its entirety. Whitacre has a category II criminal history for his prior fraud conviction before Judge Howard Baker of the Central District of Illinois. His base offense level is 10 under U.S.S.G. § 2R1.1 upwardly adjusted by 4-points for the amount of "affected commerce" and a 3-point enhancement for his role in the offense, totaling 17 points. Under criminal history category II, the court has the discretion of imposing a sentence between 27 to 33 months. Accordingly, defendant **Mark E. Whitacre is sentenced to serve 30 months on the instant conviction. Moreover, it is the order of this court that 10 months of that sentence shall be served concurrently with Whitacre's current**

term of incarceration with the remaining 20 months to be served consecutively. The court declines to impose a fine against Whitacre since it appears he has no financial resources to pay the fine. In addition, defendant Whitacre is ordered to seek the assistance of psychiatric/ pschological counseling.

CONCLUSION

For the foregoing reasons, the government's motions for upward enhancement of the sentences of Michael D. Andreas and Terrance S. Wilson are **DENIED**. Andreas' and Wilson's motions for downward departures of their sentence are **DENIED** in their entirety. The government's motion to consider the alleged citric acid conspiracy as relevant conduct to determine the base offense level for Andreas and Wilson is **DENIED**. The government's calculation of the scope of the lysine conspiracy is accepted and the calculation of "affected commerce" under U.S.S.G. § 2R1.1 will be based on domestic dry lysine sales between June 23, 1992 and June 27, 1995.

ENTER:

/s/ BLANCHE M. MANNING
UNITED STATES DISTRICT JUDGE

DATE: JUL 13 1999

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

96 CR 762

UNITED STATES of AMERICA

v.

MICHAEL D. ANDREAS; MARK E. WHITACRE; TERRANCE S. WILSON; AND KAZUTOSHI YAMADA
Defendants.

MEMORANDUM AND ORDER

[Filed January 22, 1999]

The memoranda of the government and defendants Michael D. Andreas and Terrance S. Wilson regarding the application of U.S.S.G. § 2R1.1 are before the court. The parties dispute how the court should apply § 2R1.1 to measure the "volume of commerce" necessary to calculate what, if any, upward adjustment the defendants deserve from the base offense level 10 for their antitrust conspiracy to fix the price of lysine. For the reasons set forth below, the court adopts the reasoning of *United States v. Hayter Oil Company, Inc.*, 51 F.3d 1265 (6th Cir. 1995), and will calculate the defendants'[1] sentences based on *all* domestic dry lysine sales made during the scope of the conspiracy.

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[1] Though co-defendant Mark E. Whitacre has tendered no memorandum addressing the sentencing, this order applies to him equally.

BACKGROUND

On September 17, 1998, defendants Andreas, Wilson, and Whitacre were convicted of violating the Sherman Antitrust Act, 15 U.S.C. § 1, by engaging in a global conspiracy to fix the price and allocate the sales volume of the chemical feed additive, lysine. Having denied their respective motions for judgment of acquittal, relief from judgment, and a new trial, the court turns to the outstanding sentencing issues.

On December 9, 1998, during oral argument on the post-trial motions, the parties informed the court that preliminary discussions with the United States Probation Office in connection with the preparation of the Presentence Investigation Report (PSI) revealed that there would be a significant disagreement over controlling legal issues which would affect the outcome of the PSI. To prevent the Probation Office from preparing a PSI based on erroneous legal conclusions, the parties were ordered to submit sentencing memoranda addressing disputed legal issues regarding the applicable sentencing guidelines. On January 15, 1999, the court heard oral argument on the motions. The government and the defendants dispute a single legal issue concerning sentencing: whether U.S.S.G. § 2R1.1's "volume of commerce" clause should be construed to increase the defendants' sentences based on all domestic dry lysine sold during the charged duration of the conspiracy, or only the amount of dry lysine directly affected by the conspiracy, *i.e.*, that amount actually sold at an inflated price by virtue of the price-fixing agreement.

The government contends that the plain meaning of § 2R1.1 and the per se rule governing antitrust price-fixing agreements require the court to upwardly adjust the defendants' sentences based on all domestic dry lysine[2] sold during the duration of the conspiracy. Andreas and Wilson object, asserting that the plain meaning of § 2R1.1 and supporting commentary clearly instruct the court to upwardly adjust sentences based solely on the volume of lysine sold at a price at or above the level agreed upon by the conspirators.

At the close of oral argument, the court intimated that it was inclined to agree with the defendants' theory, but at that time did not render a definitive ruling other than requiring an evidentiary hearing and informing the parties that a written ruling on the issue would be forthcoming. This is the promised ruling. After further reflection and consideration of the parties' positions, the court is convinced that *Hayter Oil* should be applied. Notwithstanding, an evidentiary hearing is necessary in order to calculate the amount of lysine sold during the conspiracy period.

ANALYSIS

When determining sentences, the court is duty bound to apply the Federal Sentencing Guidelines in a manner to effectuate their plain meaning. *See* U.S.S.G. § 1B1.7; *see also Williams v. United States*, 503 U.S. 193, 199-201 (1992); *United States v. Cortina*, 733 F.Supp. 1195 (N.D. Ill. 1990). The court may turn to the guidelines' commentary and application notes to clarify ambiguities, if any, to the relevant section's plain meaning. *Stinson v. United States*, 508 U.S. 36, 22 (1993). U.S.S.G. § 2R1.1 (b)(2) provides in relevant part:

If the volume of commerce attributable to the defendant was more than $400,000 adjust the offense level as follows:

* * *

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[2] In their respective briefs, the parties indicated that only domestic dry lysine sales (as opposed to liquid lysine) would be considered for purposes of sentencing.

> For purposes of this guideline, *the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation* . . . . (emphasis added).

The defendants and the government agree that the plain meaning controls, but dispute the definition of "affect." The plain meaning of affect is "to produce a material influence upon or alteration in;" "to act upon so as to effect a response." *Webster's Tenth Collegiate Dictionary*, 19 (1993). Webster's illustration is instructive, noting that affect "implies the action of a stimulus that *can* produce a response or reaction." *Id.* (emphasis added). Here, the action or stimulus was the agreement. Whether the agreement actually caused the objective price increase is irrelevant because the definition neither guarantees nor requires the causal force to induce a response or reaction. Instead the stimulus must present a possible response or reaction. Hence, the plain meaning permits a broad construction to attach liability even if there is only a theoretical affect on commerce, regardless of its actual effect on the price of lysine.

This definition is wholly consistent with the per se rule which governs antitrust price-fixing agreements. As previously and frequently noted in this case, the per se rule imposes criminal liability solely on the agreement even if the defendants take no overt action in furtherance of the conspiracy. *United States v. Andreas*, 23 F.Supp.2d 863, 865 (N.D. Ill. 1998), *citing Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *see also Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U .S. 1 (1979). The Sixth Circuit, in *Hayter Oil*, came to the same conclusion, reasoning that a broad interpretation of "affect" is consistent with the purposes of the Sherman Act which only requires proof of the agreement. *Hayter Oil*, 51 F.3d at 1273.

Andreas and Wilson, relying on *United States v. SKW Metals & Alloys*, 4 F.Supp.2d 166, 168-69 (W.D.N.Y. 1997), contend that affect increases sentences based only on lysine sold at or above the price objective of the conspiracy. *SKW Metals* is flawed because it imposed a narrow construction of affect based on an erroneous interpretation of § 2R1.1's background and application notes. Indeed, the application notes clearly demonstrate that affect should be broadly construed in a manner to effectuate the per se rule.

As *Hayter Oil* recognized, the application background commentary states that "[t]he offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute." U.S.S.G. § 2R1.1 commentary (background). The background comments clearly state that historically price-fixing is a per se offense and that "tying the offense level to the scale or scope of the offense is important to ensure that the sanction is, in fact, punitive and that there is an incentive to desist from a violation once it has begun." *Id.* As such, the Sentencing Commission clearly contemplated that price-fixing offenses would be governed by the per se rule and would be considered during sentencing. That said, it is absurd to impose liability based solely on the agreement only to slap the defendants on the wrist at the sentencing phase because—not for a lack of trying—the conspiracy did not achieve its price objective. *Hayter Oil*, 51 F.3d at 1272-74. Moreover, by considering only the actual price increases, Andreas and Wilson would face no liability based on their sales volume allocation agreement which was intended to effectuate the price-agreement by policing the price agreement. *Hayter Oil*, however, would permit the court to calculate based on the volume of lysine manipulated to further the pricing agreement regardless of success thereby conforming § 2R1.1 with the per se rule.

Andreas and Wilson contend that *Hayter Oil* engrafted the per se analysis to § 2R1.1 because the Sixth Circuit erroneously presumed that unsuccessful price-fixing defendants would otherwise face no fine since they did not actually increase the price. Clearly *Hayter Oil* is incorrect when it concluded that unsuccessful conspirators would completely avoid liability since § 2R1.1 imposes a mandatory minimum $20,000 fine and six-month prison term regardless of their ultimate success. *See* § 2R1.1(c)(1). Indeed, the mandatory minimum supports the application of *Hayter Oil* since it compensates for sentencing disparities which can arise merely based on the success between relative antitrust conspiracies. Andreas offers two examples: First, the defendants form the requisite agreement, but cheat or otherwise ignore it, and competitively price their product making sales at $110,000,000 and therefore no price increase occurs. Although the conspiracy did not achieve its price objective, the defendants would face a sentence ranging between 24-30 months. On the other hand, the conspirators agree, meet their price objective, but only sell $500,000 worth of lysine. In the latter case, the defendants only face a possible 8-14 month sentence.

While the disparity between the two examples is significant, the sentences are not unfair or illogical. Assuming *arguendo* that the successful conspirators had sold more lysine, due to favorable yet uncontrollable market forces, then they posed a greater overall harm to the public thereby warranting a harsher sentence. Conversely, if they formed the agreement, but their conspiracy was nonetheless unsuccessful, market variables caused them to sell less, then their sentences will be lower because the overall risk of harm to the consumers was less.

Commercial crimes, by definition, are subject to market variables that affect all business deals—legitimate or otherwise. Like the unlucky civil tort defendant who injures a "thin skull plaintiff," Andreas and Wilson assumed the risk that they could receive a higher sentence based solely on the amount of lysine sold in a given fiscal year since that amount was the volume of which they sought to fix the price. The risk of harsher sentences is just another cost factor that prospective antitrust conspirators will consider thereby promoting general deterrence through stringent sentencing that § 2R1.1 encourages. *See* 2R1.1 commentary (background). To the extent that the fiscal year is particularly bad and sales volume falls below $400,000, defendants will receive the mandatory minimum under § 2R1.1(b)(2).

CONCLUSION

For the reasons set forth above, the court shall construe U.S.S.G. § 2R1.1 to apply an upward adjustment to the defendants' sentences based on all domestic lysine prices during the scope of the charged conspiracy. The court shall convene an evidentiary hearing on February 5, 1999 to review all relevant economic and expert testimony to determine the volume of domestic dry lysine sales within the scope of the conspiracy period.

ENTER:

/s/ BLANCHE M. MANNING
UNITED STATES DISTRICT JUDGE

Date: Jan 22 1999

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

96 CR 762

UNITED STATES OF AMERICA

v.

MICHAEL D. ANDREAS; MARK E. WHITACRE; TERRANCE S. WILSON; AND KAZUTOSHI YAMADA
Defendants.

MEMORANDUM OPINION AND ORDER
[Filed December 30, 1998]

I. INTRODUCTION

In late 1996, the court began a journey in search of the truth behind what really happened at the Archer Daniels Midland Company(ADM) when it entered the international lysine market, in 1991. That is, were ADM executives Michael D. Andreas, Mark E. Whitacre, and Terrance S. Wilson guilty of price- fixing in violation of the Sherman Antitrust Act, 15 U.S.C. § 1? The journey ended on September 17, 1998, when a jury convicted all three defendants of conspiring to fix the global price and allocate the sales volume of lysine.[1]

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[1] Lysine is a chemically synthesized amino acid and primary ingredient in feed additives, *i.e.*, pig food, swine feed, etc.

The defendants now offer a plethora of reasons for why they deserve to be acquitted, granted a new trial, or have their judgments of conviction arrested pursuant to Federal Rules of Criminal Procedure 29, 33, and 34. While the defendants move separately, their motions raise, in part, common issues of fact and law applicable to all three defendants. Accordingly, their requests to incorporate each others motions to the extent that they are applicable to each defendant is granted.

II. BACKGROUND

Andreas, Whitacre, and Wilson are former ADM executives. Andreas was vice chairman of ADM's board of directors and executive vice president. Wilson was an ADM group vice president and head of ADM's Corn Processing Division. Andreas and Wilson were major players at ADM, both having worked there since the early 1970s. Whitacre joined ADM in 1989, as the president of ADM's then-newly formed BioProducts Division, which produces lysine.

The government accused ADM of masterminding the underlying international conspiracy with its foreign competitors, including: Ajinomoto Co. Ltd., (Japan), Sewon America, Inc., (Korea) Kyowa Hakko Kogyo Co., Ltd. (Japan), and Cheil (Korea). By all accounts, ADM's initial entry into the international lysine market spurred competition and caused a serious decline in the global price of lysine; customers reaped the benefits of price competition. Almost overnight, ADM took the lead in the U.S. market share. But it seems that greed spurred ADM to violate the Sherman Act.

The government alleged that in early 1992, ADM, through Wilson and Whitacre, and at the behest of Andreas, joined an international conspiracy with their competitors to fix the price of lysine. Initial discussions with Ajinomoto and Sewon in April 1992, led to a formal meeting between all of the competitors in Mexico City, Mexico, on June 23, 1992. The

FBI and the Department of Justice's Antitrust Division caught wind of this plot when, in November 1992, Whitacre alerted the FBI during an investigation of alleged industrial espionage at ADM's Decatur, Illinois lysine manufacturing plant.

Besides price-fixing, Whitacre's criminal escapades include extortion and embezzlement. In April 1991, Whitacre began embezzling money from ADM by filing phony payment vouchers for goods and services never provided to ADM.[2] While common sense suggests that it is not wise to draw attention to yourself while committing a felony, Whitacre decided to throw caution to the wind and take another roll at the dice by attempting to extort $10 million from ADM in order to conceal his embezzlement. Whitacre falsely claimed that Mr. Fujiwara, a Japanese national employed by Ajinomoto, told him that ADM competitors were sabotaging its Decatur plant to disrupt lysine production and harm ADM's market share in lysine. Whitacre related the Fujiwara story to Andreas, indicating that Fujiwara wanted to sell Japanese trade secrets and biotechnology to ADM for $10 million; the deal, of course, to be consummated through Whitacre as the middleman.

The story was inherently suspicious since Whitacre later claimed that Fujiwara lowered his price to $6 million. Andreas contacted an anonymous ADM associate who, through a round about way, (Tr. at 716), caused the FBI to investigate Whitacre's sabotage claims. As it turns out,

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[2] Whitacre still adamantly contends that he was framed by ADM in retaliation for his cooperation with "Operation Harvest King" (the FBI's price-fixing investigation). He claims that the payment voucher scheme was knowingly implemented by ADM to induce Whitacre to stay at ADM by secretly supplementing his salary without having to report the additional income to the Internal Revenue Service. He nonetheless pled to the fraud, and U.S. District Court Judge Howard Baker of the Central District of Illinois sentenced him to a term of 108 months of incarceration.

Whitacre failed two FBI polygraph tests and then admitted that the Fujiwara incident was a hoax, and that Andreas never agreed to buy stolen Japanese biotechnology. Things were looking grim for Whitacre. Although the FBI was unaware of the embezzlement, Whitacre clearly was the prime suspect in the extortion attempt. Snatching victory from the jaws of defeat, Whitacre won a temporary reprieve when he told the FBI that he and other ADM executives were conspiring to fix the global price of lysine, in violation of the Sherman Act. The FBI listened to Whitacre, but declined to inform ADM about the Fujiwara hoax.

Despite his prior deception, the government offered Whitacre an immunity agreement in December 1992. In exchange for immunity from prosecution for the lysine conspiracy, Whitacre agreed to provide completely truthful information to the government, assist the government with its investigation into ADM, and not to commit any crimes. Needless to say, Whitacre did not volunteer information concerning his embezzlement. A two and one-half year covert FBI investigation using Whitacre as a cooperating witness ensued. Over that period Whitacre surreptitiously recorded conspiracy conversations on audio and videotapes between Andreas, Wilson, and ADM's competitors.

On June 27, 1995, the FBI raided ADM's corporate offices, and everyone ran for cover. The government played the investigatory equivalent of "musical chairs" and passed out an assortment of immunity/cooperation agreements to certain ADM executives, including ADM executive Barrie Cox, and to ADM itself. Cox, at the time, was a Vice-president of Sales and Marketing of ADM's Food Additives Division, and was involved with ADM's endeavors in the citric acid market. While Cox was not alleged to be involved in the lysine conspiracy, he was allegedly aware of another uncharged, yet similar, conspiracy allegedly led by Wilson to fix the price of citric acid. The government has always contended that the lysine conspiracy was modeled after the alleged citric acid conspiracy, and sought to introduce Cox's testimony for that limited purpose. *See infra*, § IV D.

Whether they were too slow to grab a deal or simply not offered one, Andreas and Wilson were indicted. ADM eventually pled guilty to price-fixing and paid a $100 million fine. Despite his aid, the government withdrew Whitacre's immunity agreement after finally discovering that he had bilked ADM to the tune of approximately $10 million with his phony voucher scheme. As a result Whitacre once again joined his lysine brothers-in-arms, Andreas and Wilson; only this time as a co-defendant facing a potential three year sentence. Cox received immunity pursuant to 18 U.S.C. § 6001 and agreed to testify against all three, in the sense that he would establish that their lysine conspiracy was modeled after the alleged citric acid conspiracy. The court previously held that the government's proffer of evidence demonstrated that any citric acid evidence was admissible as direct evidence against Wilson and Andreas as to the existence of, and their participation in, the lysine conspiracy. The government contends that it felt compelled to immunize Cox, a British national, in order to prevent extradition disputes from delaying the prosecution.

By indicting Whitacre, the government caused its investigation to take a turn for the surreal. After his indictment, Whitacre became a media sensation by announcing that he had secretly taped many of his conversations with his FBI handlers, particularly Special Agent Brian Shepard, during his two-year odyssey as "the ADM mole." Moreover, Whitacre accused Shepard of instructing him to destroy exculpatory portions of the so-called "Whitacre tapes." Whitacre then filed a Section 1983 action against SA Shepard in the Central District of Illinois, alleging mistreatment in violation of his civil rights, which included threatening Whitacre and ignoring Whitacre's threats to commit suicide during the covert investigation.[3] The veracity of Whitacre's allegations are hotly disputed and is the crux of an ongoing due process challenge to the indictment by Andreas and Wilson, alleging selective taping and destruction of exculpatory evidence. *See* § IV B.

The FBI's Office of Professional Integrity launched an investigation into Whitacre's allegations. On April 16, 1997, Whitacre met with government counsel and FBI Agent Athena Varounis who recorded the accusations in an FBI 302 report. Similar to his numerous newspaper and magazine interviews, Whitacre claimed that his audiotapes were phony and the FBI was railroading him. To bolster his claim, Whitacre asserted that he had taped conversations with SA Shepard in which Shepard instructed Whitacre to destroy tapes. Whitacre asserted that his wife, Ginger Whitacre, and confidant David Hoech, a Florida agribusiness consultant and ADM shareholder, could corroborate the allegations. Whitacre contended that he related everything concerning Shepard's misconduct to his wife and gave her copies of taped conversations in which Shepard coerced Whitacre to destroy exculpatory evidence. Mrs. Whitacre, in turn, mailed the "Shepard tapes" to David Hoech, enclosed in an old shoe box. Hoech is the leader of the ADM Shareholders Watch Committee who, on occasion, uses the alias "Lamet Vov." Hoech and his cohorts are, to say the least, very upset with ADM's management and alleged corporate abuses within company. In addition to his wife and Hoech, Whitacre also claimed to have related accounts of his ordeal with Shepard to his in-laws, Ron and Sandy Kunkel; and his gardener, Rusty Williams.

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[3] Whitacre suffers from bi-polar disorder which frequently causes him to experience bouts of depression. He has made two publicized unsuccessful suicide attempts; the second just days prior to his sentencing for his fraud conviction. To date, the court has seen no objective evidence to indicate that Whitacre's suicide attempts were genuine.

Unsurprisingly, Andreas and Wilson moved to dismiss their indictment alleging, in part, violations of their due process rights based on the alleged selective taping and destruction of exculpatory evidence. In December 1997, due to the odd chain of events, the court convened a three-day evidentiary hearing to investigate Whitacre's allegations. Whitacre's allegations, however, quickly evaporated. Just prior to his fraud sentencing, Whitacre recanted his allegations and voluntarily dismissed his § 1983 action against Shepard.

Andreas and Wilson faced a major road block since the Whitacres and Hoech invoked their Fifth Amendment privileges against self-incrimination. However, the court did hear testimony from FBI agents that Whitacre had not been closely supervised and was frequently permitted to possess audio tapes for a long period of time, and even recorded conversations with tapes Whitacre purchased for himself, arguably in violation of FBI policy. Most tellingly, the FBI admitted that it did not possess all of the tapes which they had given Whitacre. Equally troubling, it had no accurate means to precisely determine how many tapes Whitacre failed to return since they kept no inventory of blank tapes given to him. It was not the FBI's finest hour.

In addition, expert testimony indicated that there were significant erasures and gaps in the tapes Whitacre did submit to the FBI. Finally, Andreas and Wilson tendered, for an *in camera* inspection, an audiotape containing a conversation between Whitacre and Hoech, in which Hoech acknowledges that he did "get rid of" tapes that Whitacre sent him. To date, neither the court nor the parties know whether Hoech was discussing destruction of exculpatory evidence, or whether Shepard had, in fact, compelled Whitacre to destroy evidence. During a subsequent interview with the FBI, Hoech denied that Whitacre sent him any tapes.

In light of Whitacre's allegations and the circumstantial evidence provided by the experts and the FBI agents, the court granted Andreas and Wilson wide latitude to adduce evidence at trial regarding possible destruction of tapes, but only for the limited purpose of challenging the authenticity/reliability of the tapes.

At trial, the jury heard the audiotapes and viewed videotapes surreptitiously made by Whitacre, and at times, undercover FBI agents. For example, an undercover FBI agent posing as a waitress recorded Defendant Andreas at a meeting with Hirokazu Ikeda in Irvine, California on October 25, 1993 where they allegedly discussed the price-fixing scheme. Irvine was one of numerous meetings between the defendants, including: Mexico City, Hawaii, Chicago, Vancouver, Paris, Tokyo. The defendants asserted that all the tapes memorialized legitimate trade association meetings between competitors, discussing tricks of the trade and so forth. The government cried conspiracy. The jury obviously agreed with the government and here we are.

Now, in their post-trial motions, the defendants assert that a culmination of evidentiary errors and governmental misconduct deprived them of a fair trial, for which they deserve a new one. Alternatively, they argue that the evidence does not support their convictions, and thus they should be acquitted.

III. STANDARD OF REVIEW

When reviewing a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), the Seventh Circuit mandates that the court determine:

> whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government . . . bearing in mind that it is the exclusive

> function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences (internal quotations omitted).

United States v. Reed, 875 F.2d 107, 111 (7th Cir. 1989), *quoting United States v. Marquardt*, 786 F.2d 771, 780 (7th Cir. 1986). In short, the court views all the evidence in the government's favor and is absolutely barred from second-guessing the jury's credibility determinations or findings of fact. Instead, the court merely assesses the record to determine if all the admissible evidence supports the defendants' adjudication of guilt beyond a reasonable doubt. *Id.*

In the same vein, motions for a new trial under Fed. R. Crim. P. 33 are granted where, unlike here, the defendants demonstrate that the evidence "preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Reed*, 875 F.2d at 113. Motions for new trial are disfavored and granted only in the face of exceptional circumstances such as legal errors or omissions which deprived the defendants of a fair trial. *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989).

Post-trial motions for an arrest from judgment pursuant to Fed. R. Crim. P. 34 may be granted only if the indictment does not charge an offense or the court is without jurisdiction. *United States v. Maloney*, No. 91 CR 477, 1994 WL 96673 (N.D. Ill. Mar. 23, 1994), *citing United States v. Whitted*, 454 F.2d 642, 646 (8th Cir. 1972). Neither requirement is satisfied here and the Rule 34 motion is, accordingly, denied with prejudice.

IV. ANALYSIS

A. Applicability of per se rule

1. Sales volume allocation agreement

Andreas argues that he must be acquitted or granted a new trial because of several evidentiary and legal deficiencies related to the charge that he allocated the sales volume of lysine. He argues that sales volume allocation is not per se illegal since no prior judicial opinion has adjudicated it as such. Nor, Andreas claims, can the government argue that a sales volume allocation is equivalent to an output restriction (a per se offense), since government counsel stated during trial that it was not prosecuting him for an output restriction. Assuming sales volume allocation is not per se illegal, he accordingly contends that it is conduct governed by the Rule of Reason which attaches criminal liability only if economic or expert testimony establishes that the sales volume allocation unreasonably restrained trade. *See, generally State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997). Since the government produced no such evidence, Andreas argues he is entitled to an acquittal.

Next, Andreas contends that the court erroneously instructed the jury that it could convict him if, based on the evidence adduced at trial, it found beyond a reasonable doubt that Andreas had the requisite intent to agree to either fix the price or allocate the sales volume of lysine. Since the jury rendered a general verdict, it is uncertain whether the jury found evidence of guilt as to both price-fixing and sales volume allocation, or only the latter. Assuming, the jury only found him guilty as to sales allocation, and based on Andreas' view that sales volume allocation is not a per se offense, he contends that the court constructively amended the indictment to permit the jury to convict him of a separate uncharged offense—sales volume allocation—which is legal. That is, the alleged constructive indictment caused the jury to convict Andreas for legal conduct.

Finally, if the court holds that sales volume allocation is a per se offense, Andreas asserts this would be the first adjudication. As such, he asserts that his conviction is fundamentally unfair since he never received fair notice that sales volume allocation is a crime thereby denying him due process as recognized in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

In its response brief and at oral argument, the government argued that sales volume allocation is equivalent to an output restriction which is a per se offense. The rationale for the argument is that the label/characterization "sales volume allocation" is irrelevant where, as here, the agreement substantively constitutes a form of price-fixing. Thus, the government argues that the "either or" jury instruction is harmless since both acts were per se offenses, the existence of which was supported by the evidence adduced at trial. Moreover, the government contends that no constructive amendment occurred because the sales-volume allocation, as alleged in the indictment, was in furtherance of the single price-fixing conspiracy, and not necessarily in furtherance of the price agreement, as Andreas implies.

Generally, the Rule of Reason governs antitrust violations, *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997), and requires the government to prove via economic evidence and/or expert testimony that a particular practice (like price-fixing) constitutes an unreasonable restraint of trade. The reasonableness of a particular business practice is determined by balancing the positive and negative effects the practice has on the relevant market. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Per se violations are the narrow exception to the general rule, in which the alleged misconduct is so inherently unreasonable that it is presumed to violate the Sherman Act and no factual inquiry into its effect on commerce is necessary. *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958).

Andreas concedes that an output restriction is a per se violation of the Sherman Act. Accordingly his argument for acquittal or a new trial wins or loses depending on whether sales volume allocation is a per se offense. In its September 17, 1998 order, the court held that the sales volume allocation was governed by the per se rule since, as alleged in the indictment and evidence at trial had arguably shown, the sales volume allocation was necessarily in furtherance of the price-fixing. In retrospect, the September 17 Order is ambiguous because it did not clearly specify that "price-fixing" is a category which includes agreements to directly set prices, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), and output restrictions which artificially inflate prices by intentionally reducing product supply.

As noted by the government, price-fixing is not necessarily a straightforward agreement as to price. Antitrust precedent characterizes any means or methods intentionally calculated to eliminate market competition and manipulate price to constitute price-fixing. *See generally, National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *see also United States v. Socony- Vacuum Oil Co.*, 310 U.S. 150 (1940). Output restrictions are classic per se violations which personify the law of supply because product scarcity causes consumers to pay inflated prices to satisfy demand. Unlike pure supply and demand, competitors use output restrictions to inflate profit by thwarting competition by intentionally limiting product availability. *See generally, National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979); *General Leaseways v. National Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d

221 (7th Cir. 1978), *citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The law is clear that output restrictions are inherently anti-competitive and therefore per se illegal.

That said, the first step to resolving this issue revolves around whether the government disclaimed output restrictions as a cognizable theory for liability. While objecting to the line of questioning during the cross-examination of FBI Agent Robert Herndon, government counsel stated that the indictment charged Andreas with sales volume allocation and not with an output restriction. Agent Herndon further added that the government was never aware of how much lysine the conspirators ever actually produced.

Andreas erroneously construes the statement by government counsel to mean that the government never considered sales volume allocation to be equivalent to an output restriction, implying that no output restriction could exist unless the government knew how much lysine the conspirators actually produced. Based on the government's theory of liability, actual lysine output was irrelevant except to determine whether actual output complied with the predetermined amount agreed upon by the conspirators. But for this minor ambiguity in the record, the government has consistently asserted that limiting the availability of lysine—regardless of the respective manufacturers' production capacity—constitutes a per se violation in that it artificially inflates prices and quashes competition. *See, e.g. General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) (Posner, J.)

The indictment alleged a single conspiracy to price-fix through two distinct methods: a direct agreement to set price; and sales volume allocation which, as discussed above, restricts output. A constructive amendment to an indictment arises when the offense proven at trial was not alleged in the indictment, *United States v. Remsza*, 77 F.3d 1039, 1043 (7th

Cir. 1996), or a complex set of facts distinctly different from those alleged in the indictment are presented to the jury, *United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985), or when the facts adduced at trial establish a substantive offense different from that charged in the indictment. *Id.* Direct price agreements and sales volume are two sides to the same price-fixing coin. The indictment expressly identifies both as the method and means of effectuating the price-fixing conspiracy, and the evidence established the existence of all three. As such, no constructive amendment occurred at trial.

Tellingly, Andreas never challenges the contention that, as alleged and argued in court, the application of the sales volume allocation agreement is inherently unreasonable. He avoids the issue by removing the sales volume allocation practice outside the purview of the per se classification through the very semantics he attributed to the government. Andreas criticizes the government for arguing that sales allocation agreements, by analogy to other antitrust allocation agreements, are per se illegal since the nomenclature "sales volume allocation" has never been formally recognized as a per se offense in antitrust jurisprudence. Andreas undermines his "label" argument by conceding that the applicability of the per se rule depends on whether the substance of the business practice in question, regardless of its name, is the type of pernicious anti-competitive conduct which has a "demonstrable economic effect." *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977). Accordingly, Andreas' motions for a judgment of acquittal and new trial based on constructive amendment of the indictment and application of the per se rule are denied with prejudice.

Here, there is little doubt that the sales volume allocation was, by design, an output restriction calculated to manipulate price without directly setting the price. The evidence revealed that Whitacre related to Andreas and Wilson that lysine prices could be increased by allocating volume, like that used in the alleged citric acid conspiracy. Wilson and Andreas acknowledged Whitacre's suggestion. Barrie Cox's direct testimony corroborated Whitacre, stating that sales volume agreement insures that competitors do not circumvent the price agreement by secretly selling a product at an undercut price. Similarly, Kanji Mimoto of Eurolysine (Ajinomoto's European subsidiary) confirmed that the volume allocation was the key component to success, otherwise manufacturers would have to match their competitors' price or lose customers thereby reducing market share.

A picture is worth a thousand words, but is nothing when compared to a videotape, and the government has Andreas on the video haggling with Kazutoshi Yamada over how much market share the individual competitors deserved within their price-fixing scheme, based on their respective market dominance. Since the sales volume allocation was, in essence, an output restriction that is patently illegal under clearly established antitrust law—both civil and criminal—Andreas has no basis to claim that he was unaware his actions were illegal. The degree to which the conspirators concealed their scheme with sham meetings propped up with phony agendas while secretly haggling over price dispels any plausible claim that Andreas was unaware that he was breaking the law. Mimoto admitted at trial that the conspirators were fully aware that they were breaking U.S. law, and indeed, frequently met outside the United States to impede detection by U.S. law enforcement.

2. Sufficiency of the evidence

Finally, Andreas and Wilson claim that there is insufficient evidence to sustain their convictions. In a challenge to a conviction based on a claim of insufficiency of the evidence, the court views the evidence presented at trial in the light most favorable to the government, and the conviction will be upheld if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Taylor*, 31 F.3d 459, 464 (7th Cir. 1994).

There is an abundance of evidence that, when viewed in a light most favorable to the government, sufficiently supports Andreas' and Wilson's convictions for price-fixing. That evidence includes, but is not limited to, the following:

- Ajinomoto executive Kanji Mimoto testified that in his capacity as an executive for Ajinomoto's subsidiary, Eurolysine, he met with Whitacre and Wilson at the June 1992 Mexico City meeting where they discussed allocating the sales volume of lysine. (Tr. 910-14). Mimoto identified Wilson as the main spokesman for ADM. Mimoto related that Wilson wanted ADM to have the same quantity with respect to allocation to be received by Ajinomoto.(Tr. 917) Mimoto admitted that it was common sense to know that their conduct was illegal.
- As to Whitacre, Mimoto testified that he discussed the pricing agreement with Whitacre during an August 1992 telephone conversation.(Tr. 936) Whitacre suggested that the lysine price should be increased despite a set agreement on the sales volume allocation. Whitacre invited Mimoto to visit the ADM lysine factory to observe ADM's manufacturing capacity for lysine to aid in the volume allocation negotiations, indicating that ADM would receive a larger quantity under the sales volume allocation based on its manufacturing capacity. (Tr. 938) During the trip to the lysine factory, Mimoto & Hirokazu Ikeda met Whitacre at the Chicago Marriot Hotel. Ikeda was the general manager of Ajinomoto's "international department." Mimoto admitted that ADM and Ajinomoto confirmed the price agreement during the ADM factory tour.

- Mimoto testified that Wilson, Whitacre, Masaru Yamamoto of Kyowa Hakko, and Jhom Su Kim of Cheil, met in October 1992 in Paris to confirm the then-present price levels and price schedule for lysine. Wilson and Whitacre agreed to the CIF (price for shipping from port-to-port) price schedule for lysine sales between respective markets—the United States, Asia, Korea and Japan. The CIF price was $2.30 for mid-October and $2.50 after November 1, 1992 until January 1993.
- Mimoto further testified that the lysine price agreement failed and prices dropped because the manufacturers did not keep prior promises regarding price. Price could not be maintained unless an agreement was made as to sales volume allocation. Consequently, the manufacturers convened a meeting in June 1993 at Vancouver where they agreed yet again on price, but failed to agree on the sales volume. Once again, Wilson and Whitacre were present at the meeting. Finally, at a December 1993 Tokyo meeting at the Palace Hotel, Wilson and Whitacre met with Kazutoshi Yamada of Kyowa Hakko, Ikeda, Jacques Chaudret of Eurolysine (Ajinomoto's European subsidiary), where they agreed on the sales volume allocation.
- Hirokazu Ikeda testified that he met with Andreas in October 1993 at Irvine, California with Whitacre. The government presented a video and audio tapes of that meeting at which Andreas discussed the volume and lysine capacity to secure a volume allocation equivalent to Ajinomoto.
- Alan Crouy, a former Eurolysine executive, testified that he participated at the 1992 Mexico City Meeting, and confirmed that Wilson was a prominent figure in negotiating the quantity allocation agreement. In

addition, he confirmed Mimoto's testimony regarding the October 1992 Paris meeting.

- Barrie Cox, former food additives executive with ADM, testified that he and Wilson were involved in citric acid price-fixing. The conspiracy had three steps: (1) set allocation; (2) establish a compensation scheme in which manufacturers who exceeded their volume had to repay other manufacturers for their lost profits; and (3) maintain the trade association cover to conceal their illegal acts. The conspiracy was strikingly similar to the lysine conspiracy in that the participants met during trade association meetings to discuss market conditions, volume allocations, and the like. The government produced a taped conversation between Andreas, Wilson, and Whitacre in which they confirmed that they were modeling the lysine conspiracy after the citric acid conspiracy.

- In an October 12, 1993 conversation, Andreas acknowledged that an independent auditor should be utilized to ensure that the manufacturers abided with the volume allocation. (1B46, 29). Andreas told Whitacre that "our feeling is that (coughs) any business that we lose, we're gonna take back with a higher market," (1B46, 37). Andreas further stated that he wanted to meet personally with Ikeda (presumably at the Irvine meeting) for an hour. That confirms, in part, Ikeda's testimony that he did meet personally with Andreas to discuss the conspiracy.

- In another October 12, 1993 conversation, Whitacre, Andreas, and Wilson discuss the sales volume agreement.

- In an October 13, 1994 conversation, Andreas, Wilson, and Whitacre discuss how they compared the results of the lysine conspiracy. They mentioned that the "numbers" comparison is similar to monthly comparisons used in the citric acid conspiracy.

- In a recorded conversation of the October 25, 1993 Irvine meeting, Andreas discussed volume allocation with Yamada and Ikeda, noting that the manufacturer's suffered low prices because the plan was not as successful as ADM had hoped. Andreas then goes on to discuss how much quantity each manufacturer should receive under the allocation agreement

The audio and videotapes revealed that Andreas, Wilson, and Whitacre had discussed manipulating the sales volume allocation in a calculated effort to increase price. The videotape conversations between Andreas and Kazutoshi Yamada at the October 25, 1993 Irvine Meeting clearly dispelled any question in the minds of the jurors as to Andreas' keen interest in controlling the sales volume to ensure that prices remained high. Recall, at Irvine, Andreas told his "competitors" that sales volume was the key to ensure price. At the June 28, 1994 Vancouver meeting, Andreas and Whitacre discussed volume and price; Andreas inquired whether the lysine price was meeting the $.85/lb, price objective and suggested that the competitors should be encouraged to agree to increase price by another nickel.

Of course, Andreas and Wilson claim that other conversations demonstrated they lacked intent and were lying to deceive their competitors in order to get legal market information. Based on the evidence, the court finds that it was sufficient to support the jury's finding of guilt beyond a reasonable doubt. Here, there is little doubt that the sales volume allocation was, by design, an output restriction calculated to manipulate prices without directly setting the price. In addition, the recorded conversations and co-conspirator testimony established that the defendants did, in fact, also agree to directly set the price of lysine. The degree to which the conspirators concealed their scheme with sham meetings propped up with phony agendas while secretly haggling over price dispels any plausible claim that Andreas and Wilson were unaware or did not intend to break the law. Accordingly, Andreas' and Wilson's motions for acquittal, arrest from judgment, and new trial based on insufficient evidence are denied with prejudice.

B. Due process claims

1. Motions to suppress for selective taping and destruction

Citing *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989); *United States v. Faurote*, 749 F.2d 40 (7th Cir. 1984); *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628 (6th Cir. 1992); and *United States v. Chaudhry*, 850 F.2d 851 (1st Cir. 1988), Wilson and Andreas argue that the admission of the Whitacre tapes deprived them of a fair trial, asserting that the culmination of: (1) alleged selective taping and destruction of exculpatory tapes; (2) the indictments of Yamada and Whitacre; (3) the government's refusal to immunize Ginger Whitacre and Hoech; and (4) the court's exclusion of FBI Agent Athena Varounis' testimony, denied them of their rights to present evidence of their actual innocence recognized in *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. These claims, except for suppression of Varounis' testimony were previously resolved by the Court's April 16, 1998 order.

Wilson and Andreas offer no new arguments or evidence articulating how the admission of the tapes violated their rights. To the contrary, they concede that the court granted them ample latitude to challenge the reliability of the audio and videotapes presented at trial, acknowledging that they established: (1) the FBI admitted it did not scrupulously supervise Whitacre; (2) no catalog was maintained to ascertain how many audiotapes Whitacre returned; (3) the tapes had numerous erasures and gaps probative of potential selective taping and destruction; (4) that FBI agents often had to instruct Whitacre to avoid using suggestive words to avoid entrapping the conspirators; (5) Whitacre recorded conversations which appeared to be at odds with the Attorney General's Recording Policy, as they applied to Whitacre; and (6) Whitacre often used unauthorized recording equipment and had the capability of removing audiotapes from their protective enclosure of recording equipment. As held pretrial by the court and argued by the defendants, the reliability of the audiotapes is ultimately a question of fact to be determined by the jury.

Viewed in a light most favorable to the government, *Reed*, 875 F.2d at 111 (7th Cir. 1989), there was substantial corroborative testimony from cooperating conspirators and videotapes acquired independent of Whitacre which implicated all three defendants. The court cannot overturn the jury's verdict based wholly on the defendants' displeasure with the jury's credibility determination. Accordingly, the motion to acquit or grant a new trial based on allegations of selective taping and destruction of evidence is denied with prejudice as to Andreas and Wilson.

2. Agent Varounis' testimony

Wilson and Andreas argue that the court erred in excluding the testimony of FBI Agent Athena Varounis. Varounis, a Supervisory Special Agent assigned to the FBI's Office of Professional Responsibility (the FBI equivalent of the "internal affairs" unit), interviewed Whitacre at the Antitrust Division's Chicago Office, on April 30, 1997, as part of the FBI's investigation of Whitacre's allegations of possible destruction of evidence and Shepard's alleged obstruction of justice. Keep in mind that at that time Whitacre was facing indictments for defrauding ADM, in addition to the price-fixing conspiracy.

At the interview, Whitacre recounted his prior allegations that SA Shepard instructed him to destroy (presumably exculpatory) audiotapes recorded during the ADM investigation. He also claimed that he had surreptitiously recorded tapes of his conversations with Shepard via hidden tape recorders, in which Shepard instructed Whitacre to "get rid of the tapes." In particular, four to five tapes which contained information which Varounis described in her FBI 302 report as being "favorable to ADM executives."

At trial, Andreas and Wilson moved to call SA Varounis to testify so that she could relate Whitacre's allegations of selective taping and destruction of exculpatory evidence, arguing that Whitacre's allegations were declarations against penal interest pursuant to Fed. R. Evid. 804(b)(3), and hence, admissible notwithstanding the hearsay rule. The court denied their motion and excluded Varounis from testifying. Andreas and Wilson, in their post-trial motions, assert that excluding Varounis from testifying deprived them of a fair trial and violated their rights to due process. They argue that Whitacre's allegations are against his penal interest sine they expose him to criminal liability for obstructing a government investigation. They further argue that his allegations are admissible since they have been corroborated by Ginger Whitacre and David Hoech. In response, the government contends that Whitacre's statements were inadmissible because they were not against his penal interest nor were corroborated by the surrounding circumstantial evidence at the time he rendered them.

Fed. R. Evid. 804(b)(3) carves a limited exception to the hearsay rule for declarations against penal interest premised on the theory that individuals do not make inculpatory statements and expose themselves to criminal liability unless the statements are true. *Williamson v. United States*, 512 U.S. 594, 598 (1994). The proponent of admission must demonstrate that the statement was: (1) against the declarant's interest at the time it was made; (2) corroborating circumstances exist indicating the trustworthiness of the statement; and (3) the declarant must be unavailable. *Williamson v. United States*, 512 U.S. 594, 598 (1994); *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990). The court, weighing the totality of the circumstances, must be satisfied that the statement tended to expose the declarant to liability at the time it was made. *United States v. Butler*, 71 F.3d 243, 251-253 (7th Cir. 1995); *see also United States v. Silverstein*, 732 F.2d 1338, 1345-46 (7th Cir. 1984); *United States v. Nagib*, 56 F.3d 798, 804 (7th Cir. 1995), *quoting Williamson*, 512 U.S. at 594 (1994). The parties agree that Whitacre, by virtue of his Fifth Amendment privilege, was unavailable. They dispute whether Whitacre's allegations are truly against his penal interest and whether they are sufficiently corroborated.

Wilson concedes that the record clearly establishes that Mark Whitacre does not live by the first point of the boy scout law—to be trustworthy—but contends, citing no authority, that the credibility determination for Rule 804(b)(3) statements are decided by the jury, and not the court. Yet, *Garcia* says the exact opposite, giving trial courts considerable discretion, tempered only by the rules of evidence, to assess witnesses' credibility and demeanor as part of threshold admissibility determinations. *Garcia*, 897 F.2d at 1421 (7th Cir. 1990), *citing United States v. Guinan*, 836 F.2d 350, 355 (7th Cir. 1988); *see also Silverstein*, 732 F.2d at 1347 (judges not required to ignore evidence that statements are fabrications). Factors to consider when making that determination include whether the statements were: (1) spontaneously made, *Gooch v. McVicar*, 953 F.Supp. 1001, 1007 (N.D. Ill. 1997) (Moran, J.); (2) made to curry favor with the authorities, *Garcia*, 897 F.2d at 1421; (3) made after the declarant was advised of his *Miranda* rights, *Id.*; and (4) corroborated by the surrounding circumstances to suggest that the statements are trustworthy. *Id.* Authorized to make that threshold credibility determination, the court finds that the circumstances surrounding

Whitacre's allegations indicate that they were neither against his penal interest nor adequately corroborated.

a. Against penal interest

Under Wilson's theory, Whitacre's allegations of destruction and selective taping exposed himself to the risk of prosecution for obstruction of justice. Any individual who "corruptly . . . impede[s] . . . the due administration of justice" is liable for a fine not more than $5,000 or imprisonment of five years. 18 U.S.C. § 1503. The Seventh Circuit construes § 1503 broadly to include "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *United States v. Cueto*, 151 F.3d 620, 630 (7th Cir. 1998), *citing United States v. Griffin*, 589 F.2d 200, 206 (5th Cir. 1979) (internal citations omitted).

Assuming the harshest penalty under the Federal Sentencing Guidelines were imposed, Whitacre would face a maximum of approximately 24 months for obstruction of justice. *See* U.S.S.G. § 2J1.2 (1998 Manual). In contrast, the stiffest sentence available under U.S.S.G. § 2R1.1 (price-fixing with a level 17 adjustment) is 30 months.[4] In addition, obstruction only carries a $5,000 fine, while the antitrust violation carries a maximum fine of no less than one to five percent of the volume of commerce affected, but no less than $20,000. While the parties may dispute exactly how much commerce was actually affected, based on the evidence adduced at trial, one could assume for the sake of argument that it was substantial.

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[4] This analysis does not account for the differing collateral consequences incidental to a crime of fraud or dishonesty as opposed to an antitrust offense; Whitacre's prior fraud conviction renders that question moot. *See, e.g.*, Fed. R. Evid. 609(a)(2) (conviction for a crime of dishonesty or making false statements is always admissible, regardless of punishment, notwithstanding the standard ten-year time limit provided under Fed. R. Evid. 609(b)). This discussion is not intended nor should it be construed as the court's opinion or belief as to what sentence *any* of the defendants should or might receive for their price-fixing convictions.

Clearly the price-fixing is far more burdensome than the obstruction of justice charge. Comparisons between the two charges is probative of the statements' reliability only if Whitacre knew the difference. Maybe for all Whitacre knew, obstruction was the meatier of the two offenses. However, Whitacre holds a J.D., M.B.A., B.S./M.S. in animal science, and a Ph.D in nutritional biochemistry. Over the objection of counsel, he successfully argued a motion before the court to be tried in absentia. Indeed, during argument on the absentia motion, Whitacre professed that he has working knowledge of the law. Do not forget that he is also no stranger to the Federal Sentencing Guidelines, having been sentenced by Judge Baker only four months earlier. Whitacre certainly had the motive to research the obstruction of justice statute and the guidelines since the government not-so subtly hinted at the December 1997 evidentiary hearing that, if the statements were true, individuals could be indicted for obstruction. Of course, this theory is supported only by speculation. What does matter, however, is the fact that Whitacre's statements were not spontaneous and were subsequently recanted.

Whitacre's allegations arose several months *after* his indictment for price-fixing. The circumstances of the investigation gave Whitacre the unique position of literally avoiding a criminal indictment by merely making self-serving accusations of destruction of evidence. As noted in the record, he often had sole possession of the tapes for long periods of time. If he had successfully caused the court to suppress the tapes, Whitacre would have saved himself from a very serious fine and jail time, in comparison to that which he would face for any possible obstruction of justice charge.

More importantly, Whitacre recanted his allegations during a January 26, 1998 meeting with the government just prior to his fraud sentencing. At that meeting, Whitacre admitted that Agent Shepard had not instructed him to destroy tapes, indicating that a friend at ADM promised that the company would indemnify Whitacre from the civil litigation derivative to the criminal prosecution. That admission put Whitacre in very hot water since the government would likely get the tapes admitted into evidence by rebutting claims of destruction of evidence with Whitacre's recantation. In addition, the government could conceivably indict Whitacre for obstructing the criminal prosecution.[5]

The *Williamson* Court reasoned that 804(b)(3) is premised on the theory that even dishonest people do not inculpate themselves unless it is true, but quickly cautioned that the best lies are those intertwined with elements of truth. *Williamson*, 512 U.S. at 599-600. Whitacre's conduct epitomizes Williamson 's warning. Mixed-bag confessions larded with arguably inculpatory and exculpatory statements are inherently suspect. The theoretical underpinnings of 804(b)(3) are trumped where, as here, theory cannot be squarely reconciled with the inherently unpredictable and often questionable trustworthiness of defendants like Whitacre. A suspect might confess to a burglary that transpired somewhere else at the same time he committed a homicide; taking the burglary conviction to avoid a death sentence. Similarly, a defendant might convince a friend to confess for the other's crime, thinking that the chances of the friend being prosecuted are slim. *See, e.g., Silverstein*, 732 F.2d at 1346.

Here, Whitacre's ploy was patently transparent from its inception and is consistent with his documented pattern of deceit. ADM suspected him of embezzling, so he extorts money from them to conceal the embezzlement. The government suspects him of the extortion, so he cuts a deal with the government to spy on ADM for immunity—an agreement void *ab initio* due to his ongoing embezzlement. Once the government yanked his immunity, he turned on the government and attempted to sabotage the admission of the primary evidence to be used against him in the lysine prosecution. The government argues that Whitacre fabricated the allegations in order to thwart the lysine prosecution,[6] characterizing the attempt as "in an upside-down way 'akin to a statement to curry favor with the authorities.'" It does not elaborate how Whitacre could curry favor, but the logic, in a strange way, makes sense. That is, instead of hoping that the government would be lenient, he took affirmative steps to preclude the government from prosecuting him and his counterparts Andreas and Wilson.

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[5] Again, the analysis is not intended nor should it be construed as an invitation to further prosecute Mark Whitacre.

b. Corroboration

Assuming *arguendo* that the statements were against his interest, they were not sufficiently corroborated. Importantly, there are no statements to corroborate since

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[6] At oral argument, government counsel claimed that Whitacre's allegations were motivated to thwart the lysine prosecution and then offered corroborative evidence never admitted at trial. The evidence was a tape of a purported conservation between Whitacre and his fraud confederate David Paige, which supposedly verifies the government's contention. At first, counsel insisted that the court could consider evidence outside the record, then immediately retracted his assertion. Government counsel is reminded that the scope of post-trial motions is limited to evidence entered into the record. *United States v. Baker*, 78 F.3d 1241, 1245 (7th Cir. 1996) (limiting sufficiency of evidence claims to evidence actually presented at trial). If the audiotape is as persuasive as counsel now contends, it should have been presented at the pretrial evidentiary hearing, or at the latest, during trial when Wilson invoked 804(b)(3) to admit Varounis' testimony. It undoubtedly would have assisted the court in ruling much faster on the thorny issues related to the motions to suppress for selective taping and Whitacre's allegations in general. Thus, the government has waived admission of the audiotape to support its argument.

Whitacre recanted his allegations. Contrary to Wilson's assertions, the FBI agents who testified at trial never corroborated Whitacre's allegations. While their testimony establishes that Whitacre did have the opportunity to destroy or selectively tape conversations, they never confirmed that Agent Shepard instructed Whitacre to destroy evidence. Rather, they have vehemently denied the allegations ever since they were first made.

Furthermore, Ginger Whitacre is not sufficiently reliable to corroborate her husband's testimony. Depending on the nature of the marriage, spouses can either be biased or prejudiced toward each other. Hence, the court cannot join the government in its assumption that Ginger Whitacre would necessarily lie to exculpate her husband. However, lingering questions regarding the extent of assistance she provided her husband in establishing secret offshore account in the Cayman Islands and Switzerland—even after he was indicted—lends credence to the possibility that she would be equally inclined to assist her husband to avoid conviction for the lysine offense.

Mrs. Whitacre claimed during her interview with Agent Varounis that she actually heard the Shepard tapes, and volunteered to submit to a polygraph that Shepard had attempted to coerce her husband into destroying evidence. Wilson asserts that Mrs. Whitacre's offer to undergo a polygraph is probative of trustworthiness. While there is no clear consensus as to whether polygraph results are reliable, *United States v. Scheffer*, [523 U.S. 303], 118 S.Ct. 1261, 1265-66 (1998), the court need not recount the various factors that it must weigh in determining the admissibility of polygraph evidence since the simple fact is Ginger Whitacre never submitted to one. An offer to submit to a polygraph examination is only probative if the surrounding circumstances suggest that Ginger Whitacre was serious. Mrs. Whitacre made this offer while at the Antitrust

Division's Chicago Field Office, and the court seriously doubts the government was ready and capable of taking Mrs. Whitacre up on the offer at that very moment. Even if it were, polygraph examinations are not wholly reliable and can produce false indications of either deception or honesty. While the FBI might place some faith in the test, the court finds greater probative value from Ginger Whitacre's subsequent conduct. Apparently Mrs. Whitacre's whereabouts were unknown for some deal of time prior to the pretrial evidentiary hearing. When she did appear, she invoked her privilege against self-incrimination. While the court cannot hold that against her as an admission of guilt, it does give weight to the inference that she would remain silent instead of perjuring herself in further support of her husband's deceptions.

Likewise, David Hoech provides little probative, let alone corroborative, evidence of Whitacre's allegations. From the pretrial evidentiary submissions, it is plainly clear that he associated himself with Whitacre in the belief that, at the time, Whitacre was attempting to expose corruption at ADM. Hoech is quite prolific in his ADM Shareholders Watch Letters and frequently records conversations with other persons. Wilson contends that the recorded conversation (recorded by Whitacre) between Hoech and Whitacre establishes that Whitacre did in fact, send exculpatory evidence to Hoech which was subsequently destroyed. However, in the conversation, Hoech never describes the contents of the tapes which were allegedly destroyed. The court is not convinced as to precisely what they were discussing. Moreover, both Hoech and Whitacre, in subsequent FBI 302 reports, denied ever destroying evidence and then subsequently invoked their privileges against self-incrimination to avoid further questioning on the issue at the pretrial evidentiary hearing. By remaining silent, the Whitacres and Hoech prevented the government from fully investigating a criminal matter that it never believed occurred in the first instance. At the same time, they prevented the government from acquiring evidence to use against them for potentially obstructing the lysine prosecution.

Finally, the court still wonders whatever happened to Ron and Sandy Kunkel, as well as Rusty Williams. Initially, Whitacre claimed they could corroborate his claims, but neither the government nor defense counsel ever called them to testify at the evidentiary hearing. Their sudden flight into obscurity casts further doubt that Whitacre's allegations were ever true. Given Whitacre's proclivities for deceit and the dubious motives of his corroborative witnesses presented by Wilson, the court finds that Wilson has failed to make a threshold showing of credibility and reliability to warrant admission of Agent Varounis' testimony. Accordingly, the court denies the motion for acquittal, new trial, and arrest from judgment based on the exclusion of her testimony as to Wilson and Andreas.

C. Motions to suppress Barrie Cox's testimony

1. Barrie Cox's interview and the ADM plea agreement

Wishing to leave no stone unturned, Wilson has, for the third time, moved to suppress Barrie Cox's statements regarding citric acid. Wilson's theory in support of suppression is twofold. He claims that introducing Cox's statements derived from a grant of immunity to Cox pursuant to 18 U.S.C. § 6001 somehow deprived Wilson of his Fifth Amendment privilege against self-incrimination as provided for in *Kastigar v. United States*, 406 U.S. 441 (1972). Next, he asserts that, as an ADM employee, he is a third-party beneficiary to the use immunity which the government extended to ADM pursuant to Fed. R. Crim. P. 11(e)(6) in the interim between negotiation and ratification of the ADM plea agreement.

Essentially, Wilson has filed a second motion for reconsideration concerning a perceived violation of his *Kastigar* rights based on Barrie Cox's immunity agreement. "This [c]ourt's orders are not 'mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" *Thompson v. Perryman*, No. 98 C 1596, 1998 WL 786221 (N.D. Ill. Nov. 6, 1998) (Plunkett, J.). On two prior occasions, the court clearly and unambiguously held that Wilson's *Kastigar* argument is without merit. *Kastigar* is a Fifth Amendment guarantee intended to prevent the government from prosecuting a witness based on inculpatory statements made pursuant to a grant of immunity. With the small exception of a few words to the FBI during the raid on ADM (statements which Wilson does not seek to suppress), Wilson made no statements nor submitted to any interviews with the FBI. Simple logic dictates that self-inculpatory statements made under a plea cannot be used against Wilson if he never made any. Barrie Cox—not Wilson—rendered statements under a plea agreement. As such, *Kastigar* is not even remotely implicated by Cox' interview. For the same reasons, Wilson lacks standing to enforce Cox's *Kastigar* rights assuming they had been violated. *See generally, Rakas v. Illinois*, 439 U.S. 128 (1978).

Wilson's argument that he is a third-party beneficiary to ADM's 11(e)(6) interim grant of immunity is equally unpersuasive. To bolster his argument, Wilson selectively quotes portions of two October 11, 1996 letters prepared by the Department of Justice addressed to William Taylor, Cox's attorney, and ADM counsel Aubrey M. Daniel. The letters simply and succinctly informed Taylor and Daniel that Cox, under a grant of immunity pursuant to 18 U.S.C. § 6001, was scheduled to submit to an interview with the DOJ to determine his knowledge of the price-fixing conspiracy. As is plainly evident from the face of the October 11 letters, the government gave ADM interim immunity against Cox's statements under Rule 11(e)(6) in exchange for its assistance in prosecuting the lysine conspiracy in terms of "investigati[ng] . . . allegations that *individuals and* *companies in the citric acid and in the lysine industry* . . . [provided] Mr. Cox is truthful and complete in providing information during the interview, the United States and ADM *will execute the contemplated plea agreement*."

The letters made it patently clear that Cox's testimony and cooperation was a precondition to the execution of the then prospective ADM plea agreement. During the interim between negotiations and ratification of a plea, the government extended use immunity pursuant to Fed. R. Crim. P. 11(e)(6) to ADM, agreeing not to use any information derived from Cox's interview immunity based on Cox's interview. Hence, Cox's testimony was clearly made in contemplation of a plea on behalf of ADM.

Since the ADM plea agreement expressly excludes Andreas and Wilson, Wilson turns to the October 11 letter for protection, claiming that but for the letter Cox would not have testified. He further argues that the October 11 letters' "employee protection clause" extended to Wilson since he was still an ADM executive at the time, thereby rendering him a third-party beneficiary to ADM's 11(e)(6) protection embodied in the October 11 letter. Assuming for the sake of argument, that the employee protection clause is ambiguous, the surrounding circumstances clarify that neither Wilson nor Andreas were intended beneficiaries of the plea agreement.

Plea agreements are governed by ordinary contract principles and extrinsic evidence is inadmissible to determine a contract's meaning unless it is ambiguous on its face. *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992). Plea agreements are construed in their entirety with the purpose of effectuating all of their provisions in a consistent manner. *United States v. Rourke*, 74 F.3d 802, 807 (7th Cir. 1996). Nonetheless, "disputed terms . . . are to be determined by the district court by objective standards." *United States v. Ataya*, 864 F.2d 1324, 1331 (7th Cir. 1988). Even if the employee protection clause conflicts with the contemplated plea agreement clause, the resulting ambiguity compels the court to ascertain the parties' intent from extrinsic circumstances surrounding the formation of the agreement. *Ingram*, 979 F.2d at 1184; *Ataya*, 864 F.2d at 1330. The extrinsic evidence could not be clearer: ADM was cutting a plea in exchange for naming names, and Andreas and Wilson were primary targets. At that point, whether reliable or not, the government had information from audio and videotapes that Andreas and Wilson were at the bottom of this and they were targeted for prosecution. The court declines to belabor this point any further. ADM and Cox got cover and Andreas and Wilson did not.

Accordingly, Wilson's motion to suppress Cox's testimony for violation of *Kastigar* or of his purported third-party beneficiary rights to the ADM's Rule 11(e)(6) interim agreement is denied with prejudice.

2. Cox's testimony regarding citric acid

Both Andreas and Wilson assert that admission of Barrie Cox's testimony deprived them of a fair trial, arguing that his testimony regarding the alleged citric acid conspiracy was used as impermissible propensity evidence against both of them in violation of Fed. R. Evid. 404(b). First, they contend that the citric acid evidence was not direct evidence establishing the existence of the lysine conspiracy. In support, they argue that the lysine and citric acid are two distinct markets and that citric was relevant solely to show the defendants' propensity to violate the law. In addition, Andreas separately challenges the admissibility of the citric acid renewing his claim that the government did not properly notify him of its intent to admit Barrie Cox's testimony regarding citric acid against him.

The government opposes the motions, arguing that Andreas received notice of the government's intent to use the citric acid as direct evidence to convict Andreas of the lysine conspiracy. It further contends that Barrie Cox's testimony was admissible to establish the existence of the alleged citric acid evidence to prove that Andreas and Wilson intended to pattern the lysine conspiracy on ADM's previously established citric acid conspiracy, and not to show criminal propensity.

Rule 404(b) prohibits the introduction of evidence of extrinsic acts reflective of the defendants' character unless it is probative or relevant to the defendants' knowledge, motive, intent, and opportunity to commit the charged offense. Fed. R. Evid. 404(b); *Huddleston v. United States*, 485 U.S. 681, 685 (1988); *United States v. Kellum*, 42 F.3d 1087, 1093 (7th Cir. 1994). For purposes of Rule 404(b), similar act evidence is relevant only if the jury could conclude that the act occurred and that the defendant was the actor. *Huddleston*, 485 U.S. at 689. In the Seventh Circuit, 404(b) evidence is admissible if it: (1) is directed toward establishing a matter in issue other than the defendants' propensity to commit the crime charged; (2) shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) is sufficient to support a jury finding that the defendant committed the similar act; and (4) meets the Rule 403(b) balancing test—the prejudicial effect of the evidence does not substantially outweigh the probative value. *United States v. Long*, 86 F.3d 81, 83 (7th Cir. 1996); *Kellum*, 42 F.3d at 1093, n.3, *citing United States v. Wilson*, 31 F.3d 510, 514 (7th Cir. 1994); *United States v. Evans*, 27 F.3d 1219, 1232 (7th Cir. 1994).

As the government argued and the court previously held, the citric acid evidence was not subject to the proscriptions of 404(b) because it simply was not evidence of other bad acts. Evidence of prior bad acts is admissible without implicating Rule 404(b) where, as here, it is directly related to the charged offense. *United States v. Adames*, 56 F.3d 737 (7th Cir. 1995); Citric acid evidence was admissible because it arose from a series of transactions related to the lysine conspiracy and helped to explain the context of the conspirator's conduct shown in the numerous audio and video tapes presented at trial. *United States v. Roberts*, 933 F.2d 517, 520 (7th Cir. 1991). The evidence adduced at trial, in the form of Cox's testimony, co-conspirator testimony, and the audio and video tapes, demonstrated that the lysine conspiracy was patterned on the citric acid conspiracy. Cox's testimony established that he and Wilson were involved in the citric scheme; Wilson teaching Cox how to handle the conspiracy and deal with competitors. Cox implicated Andreas by stating that Wilson reported developments in and progress of the citric acid conspiracy to Andreas personally. Recorded conversations between Whitacre, Andreas, and Wilson revealed that Andreas and Wilson assented to Whitacre's suggestions that by allocating sales volume in a manner similar to that previously employed with citric acid, the competitors could police the lysine conspiracy to ensure that competitors did not secretly circumvent the price agreement and sell lysine at discounted prices. Andreas and Wilson argued that Whitacre fooled them to make innocent comments which he contorted into incriminating evidence by selectively taping and destroying exculpatory conversations. That argument turns on credibility which the jury rejected and the court cannot disturb.

Even assuming that citric acid was not direct evidence, it was permissibly used to show that *all* of the defendants—Andreas, Wilson, and Whitacre—possessed the intent to conspire, *Kellum*, 42 F.3d at 1093; established the nature and context of the lysine conspiracy; *United States v. Sanders*, 979 F.2d 87, 90 (7th Cir. 1992); and placed the participant's conversations into context to establish the formation and identify conspiracy's goals. *United States v. Prevatte*, 16 F.3d 767, 776 (7th Cir. 1994). By establishing that sales volume allocation was utilized in citric acid, the government was able to place Andreas discussion of sales allocation at the

1993 Irvine meeting into context. Wilson is memorialized on video tapes along with Whitacre and Andreas, discussing prices and making references to citric acid and lysine.

Any propensity challenges are easily dispatched since, as shown above, the evidence had the relevant alternative purpose to prove Andreas' and Wilson's intent agree and indeed, follow through with their agreement to fix lysine prices. Both Andreas and Wilson vehemently, by virtue of their vigorous examination of witnesses and concomitant argument, contended throughout the trial that they never intended to agree or otherwise participate in illegal activities thereby placing their intent directly at issue. The citric acid evidence disproves those assertions by demonstrating that they were aware of the citric scheme and knowingly intended to model the lysine scheme after it.

Wilson objects to admissibility claiming that the citric and lysine markets are far too distinct and different to satisfy 404(b)'s similarity prong because: (1) ADM and competitors disputed price more often than in the citric conspiracy; (2) the competitors distrusted each other more than in lysine; (3) unlike citric acid, lysine involved more conspirators who schemed to increase the price of animal food instead of "people food." Negligible differences like those articulated by Wilson cannot defeat a jury conviction based on admission of 404(b) evidence. Since the citric acid evidence was admitted to show knowledge and intent, "the prior acts need not be duplicates of the one for which the defendant[s are] now being tried." *United States v. Long*, 86 F.3d 81, 84-85 (7th Cir. 1996). The similarity requirement is satisfied when prior acts share common characteristics that relate to the purpose for which the evidence is offered. *Long*, 86 F.3d at 85. Here, the citric acid evidence proved that the corporations were selling a similar, but not identical, food additive to a large market. They used a phony trade association which produced sham agendas discussing environmental and animal rights issues as a front to conceal their scheme fix lysine prices. As alleged with citric acid, a sales volume allocation agreement was used to police the price agreement.

Andreas renews his objection over the introduction of citric acid evidence claiming that the government never declared its intent to introduce it as prior bad acts evidence under 404(b). The record reveals that Andreas' arguments are wholly without merit. In a March 14, 1997 letter to Andreas' counsel, the government indicated that it intended to introduce evidence concerning the alleged citric acid conspiracy against Andreas, asserting that in its opinion, the citric acid evidence was direct evidence of the lysine conspiracy not subject to Rule 404(b). Nonetheless, Andreas was fully and reasonably informed of the nature of the evidence and thus, is foreclosed from claiming a violation of Rule 404(b)'s notice requirement.

Finally, introduction of the citric acid evidence was not unfairly prejudicial in violation of Fed. R. Evid. 403. Citric acid evidence did prejudice Wilson and Andreas in the sense that it strengthened the weight of all the evidence of their guilt. Rule 403 compels the exclusion of unfair evidence that invokes horror or emotional responses causing the jury to base its decision on considerations apart from the evidence. *Adames*, 56 F.3d at 742, *citing United States v. Peters*, 791 F.2d 1270, 1295 (7th Cir. 1986), *cert. denied* 479 U.S. 847 (1986); *see also* 2 J. Weinstein & M. Berger, Weinstein's Evidence § 403.04[1]. That was not the case here. Accordingly, Andreas' and Wilson's motions for judgment of acquittal and for a new trial based on the introduction of Barrie Cox's testimony and evidence regarding citric acid are denied with prejudice.

D. Exclusion of Andreas' and Wilson's proposed jury instructions

Andreas and Wilson challenge the exclusion of certain proposed jury instructions, asserting that the court violated their Fifth Amendment right to apprise the jury of valid theories of defense supported by the case law. In support of their motion, they further argue that the court's general instruction as to the law governing conspiracy and intent did not adequately apprise the jury of their "theory of defense." The government opposes both motions, asserting that neither Andreas' nor Wilson's jury instructions were instructions, but rather legal argument which attacked evidence adduced at trial which is improperly presented in the form of jury instructions. Specifically, the government contends that both Andreas and Wilson sought to confuse and mislead the jury regarding governing law, by attempting to instruct the jury that lack of intent to follow through with the lysine conspiracy is tantamount to finding that the defendants never formed an actual agreement to conspire to price-fix.

"[D]efendants in a criminal case [are] entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however, tenuous." *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987), *citing United States v. Boucher*, 796 F.2d 972, 975 (7th Cir. 1986) (internal citations omitted). That right, however, does not entitle defendants to have a particular instruction; rather the defendant is only entitled to have his theory *presented* to the jury. *Douglas*, 818 F.2d at 1320. A theory of defense instruction is permissible only if the defendant satisfies four requirements: (1) the proposed jury instruction is a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to include the instruction would deny the defendant a fair trial. *United States v. Brown*, 136 F.3d 1176, 1184 (7th Cir. 1998).

Andreas' and Wilson's theory of defense was that they lacked intent to join or agree to join the lysine conspiracy. They tendered, in their opinions, proposed jury instructions which accurately instructed the jury to acquit if they found that either defendant lacked intent to join the conspiracy.

Andreas' proposed instruction 19,19(b) and Wilson's proposed instruction 29 were properly excluded because they injected confusing references to contract law which could mislead the jury to believe that the agreement to conspire did not exist if the parties did not intend to comply with all of its objectives. Unlike standard criminal conspiracies, liability attaches under Sherman Act conspiracies based solely on the agreement—regardless of whether or not overt acts were committed in furtherance of the conspiracy, conspirators' second thoughts over participation, or disagreement as to the overall objective. *Coleman v. Cannon Oil Co.*, 849 F.Supp. 1458, 1465 (M.D. Ala. 1993). The mutuality of purpose language created the false impression that the conspirators formed a formal contract which precludes Sherman liability if any of the participants agreed to reap benefits of the agreement, but secretly planned not to honor all of the conspiracy objective. The Sherman Act requires no formal agreement and antitrust precedent has permitted juries to infer the existence of a conspiracy from evidence of a mere "gentlemen's agreement." 6 Phillip E. Areeda, Antitrust Law ¶ 1404, 18-20 (1986),[7] *citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Omitting the "mutuality of purpose" language, alone, was an insufficient remedy since the instructions were redundant in the first instance. The court instructed the jurors that they had to find that each of the defendants knowingly and intentionally became a member of the conspiracy, and that the defendants must be acquitted if the government had not adequately proved the intent element. No additional instruction was necessary to inform the jury to acquit if they found that Andreas and Wilson lacked the requisite intent to conspire. Accordingly, Andreas' proposed instructions 19 and 19(b) and Wilson's proposed instruction 29 were redundant and failure to submit them to the jury did not violate Andreas' or Wilson's Fifth Amendment right to present a theory of defense.

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[7] At oral argument, Wilson's counsel implied that Professor Areeda was some obscure antitrust scholar who did not carry any persuasive weight. However, Professor Areeda's scholarship has been cited by the U.S. Supreme Court in approximately 40 opinions since 1968. In other words, Areeda is to antitrust what Professor Wayne R. LaFave is to criminal procedure, and his opinions should not be lightly dismissed.

Similarly, Andreas' proposed instruction 20 was redundant. It told the jurors to acquit if they believed that the defendants' action was indicative of legal conduct. The government characterizes Andreas 20 and Wilson 29 as "dual hypothesis" instructions which encourage acquittal if the jury is tied between innocence or guilt and is prohibited in the Seventh Circuit. *United States v. Johnson*, 515 F.2d 730 (7th Cir. 1975); *see also* § 3.02 Fed. Crim. Jury Instr. 7th Cir. (1980). Both Wilson and Andreas contend that their respective instructions are supported by *United States v. Bestway Disposal Corp.*, 724 F.Supp. 62 (W.D.N.Y. 1988). *Bestway* is, as the government contends, distinguishable since it was a non-jury trial in which the judge articulated his analysis of the facts in evidence and not how the jury should be instructed. Indeed, the judge in *Bestway* merely held that the government had not produced sufficient evidence to prove intent beyond a reasonable doubt. Here, the court instructed the jury as to the government's burden to prove guilt beyond a reasonable doubt after reviewing all the evidence. Hence, the jurors were fully aware that they could acquit Andreas if they believed that his actions were legal. Accordingly, Andreas' proposed instruction 24 and Wilson's proposed instruction 29 were properly excluded.

Finally, Andreas proposed instruction 24 and Wilson proposed instruction 30 were purely argumentative. Andreas and Wilson presented their interpretation of the facts adduced at trial. The instructions are completely devoid of any law. Hence, Andreas and Wilson were not entitled to this instruction. *Brown*, 136 F.3d at 1184 (7th Cir. 1998). Accordingly, Andreas' and Wilson's motions for judgment of acquittal and for a new trial based on exclusion of jury instructions as to their theories of defense, are denied with prejudice.

E. Whitacre's claim

Defendant Whitacre raises only one challenge to his conviction. He argues that he must be acquitted because the evidence established that he did not have an adequate window of opportunity to participate in the lysine conspiracy. Specifically, he asserts that since he only had authority to legally bind ADM for approximately four days prior to cooperating with the government, he had no opportunity to violate § 1.

This same argument was rejected in *United States v. Wise*, 370 U.S. 405 (1962). The *Wise* Court construed the "every person" clause of § 1 to confer liability upon individual corporate officers under the Sherman Act even if they act without corporate authorization as long as they possess the requisite elements of the offense—knowing participation in the conspiracy. *Wise*, 370 U.S. at 416. The record is replete with evidence from which a rational trier of fact could infer Whitacre possessed the requisite intent to violate § 1—prior to his cooperation with the government's investigation—and find him guilty beyond a reasonable doubt. Accordingly, his motions for a judgment of acquittal and new trial are denied with prejudice.

V. CONCLUSION

For the reasons set forth above, the motions of Michael D. Andreas, Mark E. Whitacre, and Terrance S. Wilson for judgments of acquittal and for new trials are denied with prejudice. Absent good cause, the court shall not alter or delay the imposition of sentence which is scheduled for February 28, 1999.

ENTER:

/s/ BLANCHE M. MANNING
UNITED STATES DISTRICT JUDGE

Date: Dec 30 1998

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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96 CR 762

UNITED STATES of AMERICA

v.

MICHAEL D. ANDREAS; MARK E. WHITACRE;
TERRANCE S. WILSON; and KAZUTOSHI YAMADA
Defendants.

MEMORANDUM AND ORDER

[Filed September 17, 1998]

Defendants Michael D. Andreas and Terrance S. Wilson now move for judgment of acquittal, pursuant to Fed. R. Crim. P. 29. First, they argue there is insufficient evidence to prove they committed an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, as to the sales volume allocation allegation. Next, they contend the court must acquit them since the government has proven, at best, that the defendants participated in smaller and distinct conspiracies instead of the broad lysine conspiracy alleged to exist from June 1992 (beginning with the Mexico City meeting) until June 27, 1995.

Finally, they argue that they must be acquitted based on a variance or constructive amendment to the indictment, which they contend occurred when the government allegedly introduced evidence outside the scope of the indictment. For the reasons set forth below, the motion to acquit the defendants is denied in its entirety.

DISCUSSION

In deciding a motion for judgment of acquittal under Fed. R. Crim. P. 29, the court must construe all evidence in a light most favorable to the government and deny the motion if the court concludes that "any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *United States v. Cunningham*, 108 F.3d 120 (7th Cir. 1997). With this standard in mind, the court addresses the individual arguments for acquittal.

1. Sufficiency of Evidence for § 1 Violation

The defendants contend that, as a matter of law, they cannot be convicted of effectuating an unreasonable restraint of trade in violation of the Sherman Act. The argument revolves around whether the alleged lysine price-fixing conspiracy is governed by the per se or "Rule of Reason" doctrines governing antitrust violations. The defendants contend that sales volume allocation has never been declared a per se violation of the antitrust laws and therefore is governed by the Rule of Reason. That is, sales volume allocation is not deemed illegal unless the government produces economic evidence that establishes that the alleged sale volume allocation amounts to an unreasonable restraint of the lysine market. *See generally State Oil Co. v. Khan*, [522 U.S. 3] (1997).

The government opposes the motion, arguing that sales volume allocation alleged here constitutes a per se violation because it was committed in furtherance of the alleged price-fixing and therefore became inextricably intertwined. Thus, the government concludes that the two actions went hand-in-hand and should be analyzed as a single per se price-fixing violation. The court agrees and the motion to acquit as to sale volume allocation is denied.

The Rule of Reason is generally applied to antitrust violations, *State Oil Co. v. Khan*, [522 U.S. 3] (1997), and requires the government to prove that a particular practice (such as price-fixing) places an unreasonable restraint on trade surmised by balancing the positive and negative effects the conduct has on the relevant market. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Per se violations are the narrow exception to the general rule, in which the alleged misconduct is so unreasonable that it is presumed to violate the Sherman Act and inquiry into its effect on trade is deemed unnecessary. *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958). A particular course of conduct is not deemed a per se violation unless the courts have had "considerable experience with that type of *conduct* and application of the rule of reason has inevitably resulted in a finding of anti-competitive effects." *Bunker Ramo Corp.*, 713 F.2d at 1284 *citing United States v. Topco Associates, Inc.*, 405 U.S. at 607-608 (emphasis added). Price-fixing has been deemed a per se violation of the Sherman Act. *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996) *vacated and remanded on other grounds*, [522 U.S. 3] (1997).

The defendants claim that no court has ever addressed let alone held that sales volume allocation constitutes a per se violation and that since price-fixing and sales volume allocation are two separate and distinct violations, the Rule of Reason must govern sales volume allocation. That conclusion, however, is premised on a flawed interpretation of the indictment and a distorted interpretation of the government's theory of the case. The indictment alleges one conspiracy to fix lysine prices in which sales volumes were allocated in furtherance of the price-fixing objective. *See* Indictment ¶¶2-4; *see also* Trial Tr. 703-706. Thus, sales volume allocation merely supplemented the per se price-fixing goal and should be scrutinized under the same per se standard.

Alternatively, the defendants contend that even if sales volume allocation constituted a per se violation, that this case somehow presents unique circumstances in which the Rule of Reason should be applied. Sometimes per se violations are scrutinized under the Rule of Reason, but only when a strict application of the antitrust laws would impede the very markets that the antitrust laws are intended to protect, or when competing public policy goals cannot harmoniously coexist without some compromise in the application of the Sherman Act.

For instance, in *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1978), the Supreme Court held that blanket licensing agreements that set uniform prices are not per se violations since the policy was not solely a "naked restraint on trade" but rather served the dual purpose of protecting the parties' rights under the federal copyright law. The *Columbia Broadcasting* Court reasoned that given the market structure and product involved, price-fixing was the only reliable method of ensuring distributors and music pirates did not infringe on the intellectual property rights of composers and musicians.

Similarly, in *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984), the Supreme Court permitted the NCAA to engage in a horizontal price-fixing/output plan which limited the number of college football games the respective universities could air in a given season. The plan was intended to protect the respective university's from declining attendance due to televised games. That is, absent fan attendance there would be no games thereby mooting television revenues. Apart from these limited instances where price-fixing is a crucial means of ensuring the continued existence of the means of production or the market itself, courts have found no reason to not apply the per se rule to horizontal price-fixing schemes like the one alleged here.

Here, the defendants and their corporate competitors are hard-pressed to convince this court that it had to agree to prices in order to protect the market. To the contrary, the defendants' theory of the case has always been that they are fierce competitors who entered the market to spur competition. Nothing in the record remotely suggests that price-fixing is necessary to protect the lysine market. Nor have the defendants claimed that any supervening law or policy precludes applying the per se rule in this case. Hence, the court shall instruct the jury as to a per se violation theory of conspiring to violate the Sherman Act.

In light of the court's ruling, and viewing the evidence in a light most favorable to the government, the court denies the defendants' motion for acquittal as to the sales volume allocation count. The evidence arguably shows that the defendants set the sales volume allocation in order to facilitate the price-fixing scheme. The jury should, and will, be permitted to draw its own conclusions as to whether the sales volume was in furtherance of the price-fixing scheme. Accordingly, the defendants' motion for acquittal as to the sales volume allocation count is denied.

2. Variance/Constructive Amendment of the Indictment

Andreas and Wilson allege that they must be acquitted due to a constructive amendment to their indictment, alleging that evidence outside the scope of the indictment has been admitted at trial. They argue that the evidence does not support a three-year conspiracy as alleged in the indictment and that, at best, a conspiracy, if any, lasted from late 1993 until the middle of 1995.

In response, the government argues that the evidence establishes the existence of the alleged conspiracy. Alternatively, the government contends that the defendants waived their challenge to evidence regarding the conspiracy by failing to challenge the government's *Santiago* proffer.[1]

A constructive amendment occurs when the offense proven at trial was not alleged in the indictment, *United States v. Remsza,* 77 F.3d 1039, 1043 (7th Cir. 1996), and results from where a complex set of facts distinctly different from those alleged in the indictment are presented to the jury, *United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985), or when the facts establish a substantive offense different from that charged in the indictment. *Id.*

A variance arises when the evidence adduced at trial narrows the scope of the indictment's charges without adding any new offenses. *United States v. Remsza*, 77 F.3d 1039, 1043 (7th Cir. 1996). The Seventh Circuit has repeatedly emphasized that "the jury gets the first crack at deciding 'whether there is one conspiracy or several when the possibility of a variance appears.'" *United States v. Wilson,* 134 F.3d 855, 865 (7th Cir. 1998); *see also United States v. Magana* 118 F.3d 1173, 1186 *quoting United States v. Percival*, 756 F.2d 600, 609 (7th Cir. 1985).

The government has presented taped excerpts of the June 1992 Mexico City meeting at which Wilson himself allegedly discussed the lysine price-fixing. His statements coupled with the testimony of alleged co-conspirators Kanji Mimoto, Alain Cruoy, and Masaru Yamamoto, when viewed in a light most favorable to the government, clearly supports an inference that the defendants engaged in the conspiracy beginning on or about June 1992. Granted, the conversations could reflect legitimate conversations or criminal acts, but that is a factual issue to be resolved by the jury.

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[1] Prior to commencing the trial, the court entered an Order finding sufficient evidence establishing the existence of the alleged conspiracy consistent with the Seventh Circuit's decision in *United States v. Santiago*, 581 F.2d 1128 (7th Cir. 1978).

Assuming *arguendo* that the evidence produced at trial established that the lysine conspiracy existed for less time than alleged in the indictment, neither of the defendants are entitled to acquittal so long as the illegal conduct proven by the government is a subset of criminal activity consistent with the offense charged in the indictment. *See United States v. Wilson*, 134 F.3d at 855, 865 (7th Cir. 1998). Nothing in the record remotely suggests that the evidence presented at trial constitutes a variance to the indictment. At best, the evidence indicates that some alleged conspirators joined the alleged conspiracy at different points in time. Likewise, the evidence arguably supports the inference that defendants Andreas and Wilson were attempting to crack what they contend was an Asian lysine cartel. However these theories are wholly argumentative and, when measured against other evidence in a light most favorable to the government, cannot serve as the basis for acquittal.

CONCLUSION

For the foregoing reasons, the court denies the defendants' motions for judgment of acquittal.

ENTER:

/s/ BLANCHE M. MANNING
UNITED STATES DISTRICT JUDGE

DATE: SEP 17 1998

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
July 27, 2000

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

Nos. 99-3097, 99-3078, 99-3098, 99-3106,
99-3107, 99-3279 & 99-3363

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,

v.

MICHAEL D. ANDREAS and
TERRANCE S. WILSON,
Defendants-Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 96 CR 762

BLANCHE M. MANNING, *Judge*.

ORDER

Both defendants Michael D. Andreas and Terence S. Wilson filed petitions for rehearing and rehearing en banc. All of the judges on the original panel have voted to deny the petitions for rehearing.

None of the judges in active service have requested a vote on the petitions for rehearing en banc.[*]

IT IS THEREFORE ORDERED that the petitions for rehearing and rehearing en banc are DENIED.

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[*] Judges Flaum and Diane P. Wood did not participate in the consideration of this case.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provision

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

Statutory Provisions

15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

18 U.S.C. § 3742(e) provides:

> Upon review of the record, the court of appeals shall determine whether the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;
>
> (3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

U.S.S.G. § 2R1.1 provides in relevant part:

Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

* * *

(2) If the volume of commerce attributable to the defendant was more than $400,000, adjust the offense level as follows:

	Volume of Commerce (Apply the Greatest)	Adjustment to Offense Level
(A)	More than $400,000	add 1
(B)	More than $1,000,000	add 2
(C)	More than $2,500,000	add 3
(D)	More than $6,250,000	add 4
(E)	More than $15,000,000	add 5
(F)	More than $37,500,000	add 6
(G)	More than $100,000,000	add 7.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

U.S.S.G. § 3B1.1 provides in relevant part:

Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader,

manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization *(i.e.,* the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B 1.1(c).